Supreme Court of the United States

OCTOBER TERM, 1968

No. 201

JOHN DALMER BENTON,

Petitioner,

—v.—

MARYLAND

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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IN THE CIRCUIT COURT
FOR PRINCE GEORGE'S COUNTY, MARYLAND

Criminal Trials No. 5595

STATE OF MARYLAND, PLAINTIFF

vs.

JOHN DALMER BENTON, DEFENDANT

DOCKET ENTRIES (excerpts)

1965, April 22nd:	Presentment and Indictment for BURGLARY, COMMON LAW HOUSE BREAKING, LARCENY, filed. Bench Warrant issued and with copy of Indictment delivered to Sheriff for service.
* * * *	
1965, August 4th:	State abandons its right to prosecute the 2nd Count, Housebreaking, in C.T. 5595. Verdict: "Guilty" as to the 1st Count, Burglary and "Not Guilty" as to the 3rd Count, Larceny. "Not Guilty" as to assault and battery in C.A. 9424. Sentencing deferred.
* * * *	
1965, August 16th:	Sentenced by the Court (Judges Robert B. Mathias and Ernest A. Loveless, Jr., presiding; Donald Johnson, Reporter) that John D. Benton be confined in the Maryland House of Correction for a period of 10 years, sentence to commence as of August 4, 1965. Appeal Bond set at $7,500.00.
* * * *	

D(TRIES (excerpts)

1965, September : ce of Appeal to the Court of als of Maryland, filed.

* *

1966, January 17th ite, Court of Appeals of Mary- iled.

ied for further proceedings.

* *

1966, June 30th: nt challenges the array of d Jury.

oscoe H. Parker, presiding; Trankle, Reporter) (See

* * * *

IN THE CIRCUIT COURT
FOR PRINCE GEORGE'S COUNTY, MARYLAND

Criminal Trials No. 6369

STATE OF MARYLAND, PLAINTIFF

vs.

JOHN DALMER BENTON, DEFENDANT

DOCKET ENTRIES (excerpts)

1966, June 3rd: Presentment and Indictment for BURGLARY, COMMON LAW HOUSEBREAKING, LARCENY, filed. Bench Warrant issued and with copy of Indictment delivered to Sheriff for service.

* * * *

DOCKET ENTRIES (excerpts)

1966, August 11th:	State abandons prosecution on Count #2
	Verdict
	Guilty
	Sentenced by the Court, Judge Roscoe H. Parker, (William Trankle, Reporter) that John Dalmer Benton, Defendant, serve a term of fifteen (15) years in the Maryland Penitentiary on Count #1 and five (5) years on Count #(3) to run concurrent.
	Motion by counsel for Defense for Appeal bond.
	Motion Denied.

* * * *

[1] IN THE CIRCUIT COURT
FOR PRINCE GEORGE'S COUNTY, MARYLAND

Criminal Trials No. 6369

[Title Omitted]

TRANSCRIPT OF PROCEEDINGS—August 11, 1966

* * * *

[2] MR. O'MALLEY: Your Honor, may we approach the bench?

THE COURT: Yes.

(Whereupon, counsel approached the bench, and the following proceedings were had out of the hearing of the prospective jury:)

MR. O'MALLEY: Your Honor, I would suggest to the Court that the defendant is now charged with the crimes of burglary, housebreaking and larceny; that at a previous time he was found not guilty of housebreaking

and larceny, he was found guilty of common law burglary. The common law burglary was appealed to the Court of Appeals, and while pending, by virtue of the Schowgurow decision, it was remanded to this Court, at which time the defendant elected to have a retrial. It is the position of the defendant that the housebreaking and larceny counts, the second and third respectively, of this indictment should be dismissed, should be a bar in jeopardy as in regards to the present prosecution on those counts, and that is our motion.

THE COURT: What is your position?

MR. CHASANOW: Your Honor, we feel the Schowgurow decision is distinguishable from the Barger case. In the Barger case there was a new trial granted because of the instructions, and the Court held under those circumstances you could not retry him for the graver count when he was found not guilty of first degree murder. In the Barger case, in the opinion of the Court of Appeals, they said we are dealing only with this specific question, and I believe made mention of the fact they were not dealing with the Schowgurow remand.

We think because of the position that the defendant found himself in when the Court of Appeals remanded [3] this, he had an election either to allow the conviction to stand on the burglary or attack the whole indictment because of the Schowgurow defect; that he elected to attack the whole indictment and, therefore, has placed himself in the position of being tried on the whole indictment when reindicted, and we feel this is distinguishable.

THE COURT: Yes. I can't see under the Schowgurow decision where this would be double jeopardy, where he is asking for another trial.

MR. O'MALLEY: The Schowgurow decision took pains to state that nothing in that opinion was to be retrospective, and you can't resurrect a not guilty unless you are retrospective.

THE COURT: Well, we will wait and see.

MR. O'MALLEY: Is Your Honor denying my motion?

THE COURT: That is true.

* * * *

IN THE CIRCUIT COURT
FOR PRINCE GEORGE'S COUNTY, MARYLAND

Criminal Trials No. 6369

STATE OF MARYLAND

v.

JOHN DALMER BENTON, DEFENDANT

MOTION FOR JUDGMENT NON OBSTANTE VEREDICTO OR IN THE ALTERNATIVE FOR A NEW TRIAL—
Filed August 16, 1966

Comes now the defendant through counsel and moves this Court for a judgment non obstante veredicto or in the alternative for a new trial and in support of said motion represents to the Court as follows:

1. The defendant was found guilty of "Burglary" and "Larceny" on August 11, 1966 and sentenced to serve fifteen (15) years on the "Burglary" count and five (5) years on the "Larceny" count, the sentences to run concurrently.

2. Prior to this trial the defendant was found "not guilty" on the "Larceny" count as well as assault on the complaining witnesses. The defendant made a motion prior to trial pleading that the "larceny" count was barred by jeopardy but said motion was denied. The court therefore erroneously admitted into evidence facts supporting the "larceny" count as well as a basis for the felonious intent required in the "Burglary" count.

3. Prior to the introduction of evidence the defendant petitioned the Court to bar the introduction of any testimony relating to assault on the complaining witnesses in that the defendant had already been found not guilty of such offenses. The Court erroneously denied the defend-

ant's petition and permitted this testimony as regards "other crimes". Such testimony was prejudicial to the defense.

4. The evidence established that house in question had been locked prior to the defendant's entrance but no evidence was introduced to show a "breaking" as is required in common law burglary. The Court therefore, at the conclusion of all of the evidence, erroneously denied defendant's motion for judgment of acquittal.

5. The Court, without request having been made by the defendant, instructed the jury in an "advisory way" with regard to the defendant's failure to take the stand in his own defense. The Court further instructed the jury that they were not bound to follow this instruction but that they were the final arbiters of the law as well as the facts. Upon objection by the defendant the Court refused to alter it's instruction. The instruction given violated the defendant's rights under the Fifth Amendment of the Constitution of the United States.

WHEREFORE, it is respectfully moved that a judgment non-obstante veredicto be entered herein as regards both counts of the Indictment or in the alternative that a new trial be granted.

/s/ Thomas M. O'Malley

/s/ Michael F. X. Dolan
Attorneys for Defendant
1629 K Street, N. W.
Washington, D. C.

[1] IN THE CIRCUIT COURT
FOR PRINCE GEORGE'S COUNTY, MARYLAND

Criminal Trials No. 6369

[Title Omitted]

TRANSCRIPT OF PROCEEDINGS—August 25, 1966

The above-entitled matter came on for argument on the defendant's motion for Judgment N. O. V. or in the alternative for a New Trial in open court at 9:35 o'clock, a.m.

* * * *

[7] MR. CHASANOW: * * *

As to the second contention, first of all as to Schowgurow, the defendant, following the Schowgurow decision, attacked the indictment and attacked his conviction because the Court had no jurisdiction to try the case because the grand jury was illegally constituted. I don't think, in the grand jury decision, he can say, "I think my trial was invalid, the Court lacked jurisdiction, but this part of the trial was okay. I want to attack this part of the trial."

He is attacking the trial. He is entitled to a new trial because the Court was without jurisdiction to try him, the grand jury was illegally constituted. But when he attacks the trial, he can't say "I just want to leave part of it as valid and let me just pick and choose what part I want to say is invalid." The whole thing is under attack. The whole trial is invalid. The State can certainly reap a little benefit out of that.

* * * *

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

No. 252

Initial Term, 1967

JOHN DALMER BENTON

v.

STATE OF MARYLAND

Anderson
Morton
Orth
Thompson
O'Donnell, William J.
(specially assigned)
JJ.

OPINION BY ANDERSON, J—Filed: August 17, 1967

Appellant, John Dalmer Benton, was indicted under a three count indictment charging him in the first count with burglary, in the second count with housebreaking and in the third count with larceny. He was tried on April 22, 1965, in the Circuit Court for Prince George's County before a jury. The State abandoned the second count and the jury returned a verdict of guilty as to the first count (burglary) and not guilty as to the third count (larceny). Appellant was sentenced on the burglary conviction to ten years in the House of Correction. Thereafter he noted an appeal to the Court of Appeals of Maryland.

Prior to a hearing on the merits of his appeal and on the basis of the decisions of the Court of Appeals in *Schowgurow* v. *State*, 240 Md. 121, 213 A. 2d 475 (1965); *State* v. *Madison*, 240 Md. 265, 213 A. 2d 880 (1965); *Smith* v. *State*, 240 Md. 464, 214 A. 2d 563 and *Hays*

and Wainwright v. *State*, 240 Md. 482, 214 A. 2d 573 (1965), the case was remanded by order of the Court of Appeals to the lower court for the purpose of ascertaining whether the appellant desired to avail himself of the relief afforded by the aforesaid rulings handed down by that Court in those cases. Appellant elected to avail himself of such relief and have the indictment upon which he was originally tried declared invalid.

On June 3, 1965, appellant was reindicted under a similar three count indictment charging him with burglary, housebreaking, and larceny. Prior to trial appellant moved to dismiss the larceny count on the grounds of double jeopardy. The court denied the motion and on August 11, 1965 appellant was retried in the same court before a jury, Judge Roscoe H. Parker presiding. The State again abandoned the second count and the jury returned a verdict of guilty on the first count (burglary) and guilty on the third count (larceny). He was sentenced to fifteen years in the Maryland Penitentiary on the first count and five years in the Maryland Penitentiary on the third count, sentences to run concurrently. From his convictions and sentences he now appeals to this Court.

Appellant raises four contentions on this appeal: (1) that appellant was placed in double jeopardy when the trial court allowed the State to prosecute appellant on the larceny charge when he had previously been found to be not guilty of larceny; (2) that appellant was prejudiced as a result of the larceny charge; (3) that the trial court abused its discretion by failing to grant a removal of the case to another jurisdiction; and (4) that the trial court should have instructed the jury in mandatory terms not to infer guilt from appellant's refusal to testify.

I

In support of his first contention appellant argues that the answer lies in the very language of the remand where the Court of Appeals said: ". . . appellant herein was indicted by an illegally constituted Grand Jury and/or was tried and convicted by a Petit Jury before our decisions in *Schowgurow*, *Madison*, *Smith*, *Hays* and *Wain-*

wright and that the appellant's conviction had not become final before our decision in *Schowgurow*." By the above language he contends that the court made specific reference to the fact that it was remanding only the conviction and not all of the charges under the indictment, and that obviously appellant was only appealing the charge that he was convicted of and the Appellate Court could remand no more than was before it.

The same contention was raised before this Court in *Sadler* v. *State*, 1 Md. App. 383 (1967). In the *Sadler* case the facts were quite similar to the facts here. There this Court said: "Assuming, without deciding, that the Appellants are correct in their assertion that the action of the lower court in the first trial amounted to judgments of acquittal on the charges of assault with intent to rape and assault, we are of the opinion that their second trial did not constitute placing them in double jeopardy." In arriving at this conclusion this Court relied upon the decision of the Court of Appeals of Maryland in *Tate* v. *State*, 236 Md. 312, 316 (1964) where the Court said:

> "It has been held repeatedly in this State that when a traverser has been tried on an indictment or information that is invalid, he is not in jeopardy and he may be indicted and tried again. *State ex rel. Shatzer* v. *Warden*, 192 Md. 728, 64 A. 2d 711; *Kenny* v. *State*, 121 Md. 120, 87 Atl. 1109; *Stearns* v. *State*, 81 Md. 341, 32 Atl. 282."

In *Sadler* this Court found that the appellants by their election to have the indictments involved in their first trial declared invalid under *Schowgurow*, *supra*, and *State* v. *Madison*, *supra*, brought their cases squarely within the rule set forth in *Tate* v. *State*, *supra*.

In *Smith* v. *State*, *supra*, the Court pointed out that the holding in *Schowgurow* and *Madison*, *supra*, "does not render the judicial proceeding based upon the indictment null and void but only gives the defendant the right, by timely action, to attack it." Here the appellant exercised his right, by timely action, to attack his indictment. His attack resulted in the indictment being held

invalid which brings his case within the rule stated in *Tate*.

It is true that the Court of Appeals has held "that where there has been a regular trial on a valid indictment and a finding of not guilty of a specific offense, the accused cannot thereafter be tried again at the instigation of the State for the same offense." *State* v. *Barger*, 242 Md. 616, 625, 626, 220 A. 2d 304 (1966). But this rule is predicated upon a valid indictment. In the instant case the appellant's original indictment by his election was invalidated.

We, therefore, reaffirm our holding in *Sadler* v. *State*, *supra*, and find appellant's first contention to be without merit. See *United States* v. *Ewell*, 383 U.S. 116 and *United States* v. *Tateo*, 377 U.S. 463.

II

Since we find appellant's first contention to be without merit he could not have been prejudiced at his new trial as a result of the larceny charge, and we, therefore, find his second contention to be without merit.

III

Thirdly, appellant contends that the trial court abused its discretion by failing to grant a removal of the case to another jurisdiction.

Appellant contends that the complaining witness is a well known practicing lawyer in Prince George's County, and the situs of the crime, the home of the complaining witness, is used as a recreation and gathering place for prominent County residents. Appellant admits that while a criminal defendant has no absolute right to removal in a non-capital case, *Heslop* v. *State*, 202 Md. 123, 95 A. 2d 880 (1953), the court should grant a motion for removal where the defendant shows he may be tried in a prejudicial atmosphere.

"The question of whether a non-capital criminal case should be removed to another jurisdiction is one which rests within the trial court's discretion, Maryland Constitution, Art. IV, Sec. 8; Maryland Rules 542 a (1) and

738 (b); but the trial court's decision is reviewable on appeal for a determination of whether there has been abuse of discretion. *Downs* v. *State*, 111 Md. 241, 73 A. 893; *Piracci* v. *State*, 207 Md. 499, 509, 115 A. 2d 262; *Basiliko* v. *State*, 212 Md. 248, 129 A. 2d 375." *Seidman* v. *State*, 230 Md. 305, 324, 187 A. 2d 109 (1962).

We find no abuse of discretion by the trial court. Appellant did not meet his burden of persuasion with regard to his claim, for the accused must make an affirmative showing that he has been prejudiced by adverse publicity, and that the accused was not in a position to rely upon the voir dire examination for protection against a prejudiced juror. *Seidman* v. *State*, *supra*, and cases therein cited.

Here, as pointed out by the trial judge, there was no great publicity regarding the case, no prejudicial statements made in the paper, no inflamatory remarks made about the defendant in the County and there was no exercise of *voir dire* as to anybody knowing the prosecuting witness or whether he had ever acted as a lawyer. In fact, the Judge said Mr. West, the prosecuting witness, was primarily in the real estate business and he found no prejudice.

IV

Appellant's fourth and final contention is that the trial court should have instructed the jury in mandatory terms not to infer guilt from appellant's refusal to testify. Article 15, Sec. 5, of the Maryland Constitution provides that "in all criminal cases the jury shall be the judges of law as well as fact, except that the court may pass upon the sufficiency of evidence to sustain conviction." The section's constitutionality, in the light of the Fourteenth Amendment to the Constitution of the United States, was exhaustively reviewed in *Slansky* v. *State*, 192 Md. 94, 63 A. 2d 599 (1948), and reaffirmed in *Giles* v. *State*, 229 Md. 370, 382, 183 A. 2d 359 (1961), a case that was subsequently dismissed by the United States Supreme Court in *Giles* v. *Maryland*, 372 U.S. 767 (1963).

Although the court's instruction was in an advisory capacity, he told the jury that they were not to attach

any significance or inference of guilt from appellant's failure to take the witness stand because every individual has an absolute constitutional right not to testify, and no inference of guilt can be presumed because he chose not to take the stand. We find no error in the court's instruction in this regard.

For the above reasons, the judgment of the lower court will be affirmed.

Judgment affirmed; costs to be paid by appellant.

SUPREME COURT OF THE UNITED STATES

No. 1185 Misc., October Term, 1967

JOHN DALMER BENTON, PETITIONER

v.

MARYLAND

On petition for writ of Certiorari to the Court of Special Appeals of the State of Maryland.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—June 17, 1968

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to the following questions:

(1) Is the double jeopardy clause of the Fifth Amendment applicable to the States through the Fourteenth Amendment?

(2) If so, was the petitioner "twice put in jeopardy" in this case?

The case is transferred to the appellate docket as No. 1539 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

PETITION NOT PRINTED

No. 201

JOHN DALMER BENTON,

Petitioner,

—v.—

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE MARYLAND COURT OF APPEALS

BRIEF FOR THE PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 201

JOHN DALMER BENTON,

Petitioner,

—v.—

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE MARYLAND COURT OF APPEALS

BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the Court of Special Appeals of Maryland entered on August 17, 1967 is reported at 232 A.2d 541, 1 Md. App. 647 (1967). Appellant sought certiorari from the Maryland Court of Appeals which was denied on December 7, 1967.

Jurisdiction

The judgment of the Special Court of Appeals of Maryland was made and entered on August 17, 1967. A copy of the judgment and opinion was appended and appears on pages 8-13 of the appendix which is printed as part of the record in this cause. Petition for certiorari was denied, without opinion, by the Maryland Court of Appeals on December 7, 1967. The petition for writ of certiorari was filed with the clerk of the Supreme Court of the United States on January 16, 1968. On June 17, 1968, this Court issued an order granting the petition for writ of certiorari and placing the same on the summary calendar.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

Constitutional Provisions Involved

1. Article Five of the Constitution of the United States of America:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; *nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;* nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." (Emphasis supplied.)

2. Article Fourteen of the Constitution of the United States of America:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Questions Presented

The instant case presents the following two questions:

1. Is the double jeopardy clause of the Fifth Amendment applicable to the States through the Fourteenth Amendment?

2. If so, was the petitioner "twice put in jeopardy" in this case?

Statement

The First Trial

On April 22, 1965, petitioner was indicted in the Circuit Court for Prince George's County, Maryland, in criminal trial No. 5595 for burglary, common-law housebreaking and larceny (A. 1). At trial, the State abandoned prosecution on the second count of the indictment, housebreaking, and the jury returned a verdict of guilty as to the first

count, burglary, and not guilty as to the third count, larceny (A. 1). Petitioner was sentenced on the burglary conviction to ten years in the house of correction.

Petitioner appealed to the Maryland Court of Appeals and, in appeal case No. 469, the court remanded the conviction (A. 2). The order was made on the basis of *Schowgurow* v. *State*, 240 Md. 121, 213 A.2d 475 (1965) and *State* v. *Madison*, 240 Md. 265, 213 A.2d 880 (1965).

Page 4 of the Maryland Court of Appeals Order directing the remand in case No. 469, contains, in part, the following statement:

> "Whereas, in the above-entitled appeal, it appeared from the record that the appellant herein was indicted by illegally constituted grand jury and/or was tried and convicted by petit jury before our decision in *Schowgurow, Madison, Smith, Hayes,* and *Wainwright* and that the appellant's conviction had not become final before our decision in *Schowgurow* . . . .
>
> "Ordered: by the Court of Appeals of Maryland that the above-entitled Appeal be remanded to the lower court for further proceedings so that the appellant herein may be brought into open court, with counsel present, either privately engaged or court appointed, and with a court reporter present for the purpose of ascertaining whether the appellant desires to avail himself of the relief afforded by the rulings handed down by this Court in a decision herein referred to . . . ."

Petitioner elected to have the conviction set aside (A. 7).

The Second Trial

On June 3, 1966 a new indictment was rendered in Case Number 6369 (A. 2). Petitioner was again charged with burglary, common-law housebreaking and larceny. At trial the State again abandoned prosecution of Count II of the indictment, common-law housebreaking (A. 3).

Prior to trial, petitioner's counsel moved the court to dismiss the larceny charge on the grounds of double jeopardy (A. 3-4). The trial court asked government counsel to state his position as to this motion and the prosecutor replied:

> "We think because of the position that the defendant found himself in when the Court of Appeals remanded this, he had an election either to allow the conviction to stand on the burglary or attack the whole indictment because of the *Schowgurow* defects; that he elected to attack the whole indictment and, therefore, has placed himself in a position of being tried on the whole indictment when re-indicted, and we feel that this is distinguishable.
>
> The Court:
>
> "Yes. I can't see under the *Schowgurow* decision where this would be double jeopardy, where he is asking for another trial" (A. 4).

Petitioner was tried on Count I, burglary, and Count III, larceny. The jury returned a verdict of guilty on both counts of the indictment, and petitioner was sentenced to 15 years of imprisonment on Count I, burglary, and 5 years on Count III, larceny, the sentences to run concurrently (A. 3).

ARGUMENT

I.

The Fifth Amendment's Prohibition Against Prosecution of a Defendant Twice for the Same Offense Should Apply, Through the Fourteenth Amendment, to State Prosecutions.

The first issue present in this case is whether the double jeopardy provision of the Fifth Amendment to the United States Constitution is applicable to State prosecutions through the Fourteenth Amendment.

If the Fifth Amendment's prohibition against "double jeopardy" applies to State prosecutions, then the federal standard for enforcement of this protection must be complied with by the State. *Malloy* v. *Hogan,* 378 U.S. 1, 10 (1963). And, as will be shown in this brief, the State of Maryland did not comply with the federal standard in dealing with petitioner.

The issue of the applicability of the Fifth Amendment in State prosecutions by absorption or incorporation into the Fourteenth Amendment was previously considered by this Court in *Palko* v. *Connecticut,* 302 U.S. 319 (1937)[1]

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[1] According to Justice Cardozo, the States are prohibited from violating those fundamental principles of liberty and justice that lie at the base of all our civil and political institutions regardless of whether those principles are enumerated in the Bill of Rights. *Palko* v. *Connecticut, supra.* This so-called "ordered liberty" concept was subsequently stated by Justice Frankfurter in *Adamson* v. *California,* 332 U.S. 46 (1947). According to him:

> "[The Fourteenth] Amendment neither comprehends the specific provisions by which the founders deemed it appropriate to restrict the federal government nor is it confined to them. The Due Process Clause of the Fourteenth Amendment in

where it was held that the Fifth Amendment was not applicable. It is respectfully submitted that the *Palko* decision lacks vitality in light of subsequent decisions of this Court and therefore, should not be followed in the instant case. Defendant Palko was indicted for first degree murder but found guilty of second degree murder, and thus, impliedly acquitted of the first degree murder charge. The State appealed and a new trial was ordered. In the second trial the defendant was found guilty of first degree murder and a death sentence imposed despite the defendant's objection of having been subjected to double jeopardy. On appeal, the United States Supreme Court phrased the issue of applicability as follows:

> "Does it [double jeopardy] violate those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions?" 302 U.S. at 328.

The Court concluded that double jeopardy was not one of those "fundamental principles" and therefore the Fifth Amendment was not to be extended to the States.

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relation to the Federal Government. . . . Judicial review of that guarantee of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [appealed from] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English speaking peoples even toward those charged with the most heinous offenses." *Adamson* v. *California, supra,* at 66-67.

It was also in the *Adamson* case that Justice Black, joined by Justice Douglas, vehemently dissented from the step-by-step "ordered liberty" interpretation. 332 U.S. at 71-75. In Justice Black's opinion, the "ordered liberty" concept left the Justices too much at large to impose their own views, periodically expanding and contracting the protective content of due process.

The decisions relied upon by the *Palko* Court have been undermined or overruled by the Supreme Court in recent years. *Twining* v. *New Jersey*, 211 U.S. 78 (1908), relied on in *Palko*, held that the privilege against self-incrimination was not a "fundamental privilege" and that section of the Fifth Amendment was therefore not applicable to the State governments. But, in *Malloy* v. *Hogan, supra*, this Court held, in spite of *Twining*, that the Fourteenth Amendment prohibited State infringement on the privilege against self-incrimination to the same extent that the Fifth Amendment prohibited the Federal Government. The *Palko* Court also referred to *West* v. *Louisiana*, 194 U.S. 258 (1904) in which the Sixth Amendment's right to confrontation of witnesses was not such a "fundamental principle of liberty and justice" as to be applied via the Fourteenth Amendment to State prosecutions. However, in *Pointer* v. *Texas*, 380 U.S. 400 (1965) the Court expressly overruled *West* v. *Louisiana, supra.*

It is further submitted that the *Palko* reasoning should not be followed because the "double jeopardy" guaranty is in fact as much a fundamental principle of liberty and justice as other provisions of the Bill of Rights which have been made applicable to the States through the vehicle of the Fourteenth Amendment. Under decisions of this Court, most of them subsequent to *Palko*, the following Amendments to the United States Constitution have been made applicable to the States through the Fourteenth Amendment. The First Amendment, *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964) (Freedom of the Press); the Fourth Amendment, *Mapp* v. *Ohio*, 367 U.S. 643 (1961) (protection against unreasonable searches and seizures by the State Government); the Fifth Amendment, *Chicago*,

B & Q R.R. Co. v. *City of Chicago,* 166 U.S. 226 (1897) (protection against deprivation of property without just compensation); Fifth Amendment, *Malloy* v. *Hogan, supra* (protection against self-incrimination); Sixth Amendment, *Gideon* v. *Wainwright,* 372 U.S. 335 (1962) (right to assistance of counsel in criminal cases); Sixth Amendment, *Pointer* v. *Texas, supra* (right of the defendant to be confronted by the witnesses against him); and, Eighth Amendment, *Robinson* v. *California,* 370 U.S. 660 (1962) (protection against cruel and unusual punishment).

It is submitted that justification for incorporation of the Fifth Amendment into the Fourteenth Amendment lies in the very language of the *Palko* decision. The history of the "double jeopardy" protection indicates that it is a "fundamental principle of liberty and justice which lie at the base of all our civil and political institutions." As stated in *United States* v. *Wilkins,* 348 F.2d 844, at 850 (1st Cir. 1965):

> "'Abhorrence to successive reprosecutions is deeply rooted in our common law traditions, and the Bill of Rights' curb on the power of the Federal Government to reprosecute is ample recognition of how central this abhorrence is to our Constitutional concept of justice."

And, as stated by Justice Black in his dissenting Opinion in *Bartkus* v. *People of State of Illinois,* 359 U.S. 121, at 153 (1959):

> "While some writers have explained the opposition to double prosecutions by emphasizing the injustice inherent in two punishments for the same act, and others have stressed the dangers to the innocent from allowing the full power of a State to be brought against

them in two trials, the basic and recurring thing has always simply been that it is wrong for a man to 'be brought into Danger of the same Offense more than once.' Few principles have been more deeply 'rooted in the traditions and conscience of our people'."

It is submitted that the Court should incorporate the "double jeopardy" provision of the Fifth Amendment and make it applicable to the States through the Fourteenth Amendment so as to bring about a uniform standard with respect to "double jeopardy" not present today.[2] "The

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[2] Substantial distinctions exist between the federal standards of enforcement of the "double jeopardy" provision and enforcement of State adopted "double jeopardy" rules. Some States have no prohibition against placing a defendant in "double jeopardy". In contrast to the Federal Rule that "double jeopardy" attaches upon the swearing of the jury, *Downum* v. *United States*, 372 U.S. 734 (1963), or when evidence is first heard in a non-jury trial, *McCarthy* v. *Zerpst*, 85 F.2d 640 (10th Cir.), cert. denied 299 U.S. 610 (1936), some States follow the English rule which postpones attachment of jeopardy until entry of a verdict. *State* v. *Pace*, 210 Miss. 448, 49 So. 2d 710 (1951). Pennsylvania confines its constitutional prohibition against "double jeopardy" to capital cases only. *Commonwealth* v. *Baker*, 196 A.2d 382, 384, 385, 413 Pa. 105 (1964). A few States permit retrial after an acquittal on the merits where the indictment was defective. *State* v. *Keating*, 223 Mo. 86, 94, 95; 122 S.W. 699, 700, 701 (1909); *Benton* v. *State*, *supra* (Maryland). North Carolina allows the reopening of all offenses charged in an earlier proceeding. *State* v. *Beal*, 202 N.C. 266, 162 S.E. 561 (1932). Several States allow the prosecutor to appeal acquittals on the merits. *State* v. *Lee*, 65 Conn. 265, 30 Atl. 1110 (1894); *State* v. *Felch*, 92 Vt. 477, 105 Atl. 23 (1918); *State* v. *Witte*, 243 Wis. 423, 10 N.W.2d 117 (1943). See Conn. Gen. Stat. Rev. §54-96 (1958) permitting the State to appeal questions of law and Wisconsin Stat. §958.12(1)(d) (1961), to the same effect. The Missouri Supreme Court recently held that the "double jeopardy" guarantee is not violated where, following the reversal of his conviction for second degree murder resulting after trial on a charge of first degree murder of which the defendant was impliedly acquitted, the defendant is tried again for murder in the first degree. *State* v. *Crane*, 420 S.W.2d 309, —— Mo. —— (1967).

very essence of a healthy federalism depends upon the avoidance of needless conflict between the State and Federal Courts." *Elkins* v. *United States,* 364 U.S. 206, 221 (1960). By outlawing the present dual and conflicting systems, nondiscriminatory treatment of State defendants may be accomplished. Incorporation can beneficially end speculation by State courts as to whether, in each case, a particular State prosecution for the same offense under the same evidence would be considered by the United States Supreme Court so "acute and shocking that our polity will not endure it". *Palko* v. *Connecticut, supra.* It appears that the advantages of incorporation far outweigh the disadvantages.

Another argument in favor of incorporation is the historical purpose and intent of the framers of the Fourteenth Amendment. As stated by Justice Black in *Adamson* v. *California,* 332 U.S. 46, at page 71:

> "My study of the historical events that culminated in the Fourteenth Amendment, and the expression of those who sponsored and favored, as well as those who opposed its admission and passage, persuades me that one of the chief objectives that the provisions of the Amendment's first section, separately and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the States. With the full knowledge of the import of the *Barron* decisions, the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the Constitutional rule that cases had announced. This historical purpose has never received full consideration or exposition in any Opinion of this Court interpreting the Amendment."

The task of drafting the Fourteenth Amendment was vested in the "joint committee on reconstruction." The

first draft was presented by Representative Bingham who stated that the purpose of the new amendment was to give Congress power to enforce "this immortal Bill of Rights" upon the states. Congressional Globe, 39th Congress, 1st Session 1034 (1865-1866). After the passage of the Amendment in the House of Representatives, Senator Howard introduced the proposal into the Senate during a speech which furnishes strong evidence that Congress intended to incorporate the Bill of Rights into the Fourteenth Amendment. He stated that there was presently no power in the Constitution for Congress to enforce the first eight Amendments against State deprivation of those rights, and that the purpose of the proposed amendment was to give Congress such power. Congressional Globe, 39th Congress, 1st Session at 2766 (1865-1866). Senator Howard's interpretation of the amendment was not questioned and no committee member gave a different interpretation of the meaning, intent and purpose of the amendment. Also see, Flack, *The Adoption of the Fourteenth Amendment* (1908) at p. 87.

It appears that the civil law's counterpart to "double jeopardy" has received more appropriate consideration. Justice Holmes in *United States* v. *Oppenheimer,* 242 U.S. 85 (1915), considering the principle of *res judicata* in civil cases, held that an adjudication should be considered final and binding between the same parties on the same question, as a fundamental principle of justice.

Because of the vast resources of a prosecutor in criminal cases, the stigma inherent in defending a criminal action, and the realization that if the State can re-try the issue before enough juries, a conviction is likely to occur simply as a matter of mathematical probability, "double jeopardy"

has even more applicability in criminal prosecutions than *res judicata* does in civil proceedings. Absent the "double jeopardy" protection, the State does not dispute fairly with its citizens.

For the several reasons here advanced this Court should incorporate the "double jeopardy" protection of the Fifth Amendment into the Fourteenth Amendment and thereby make it applicable in State criminal prosecutions.

II.

The Petitioner Was "Twice Put in Jeopardy" and His Conviction at the Second Trial Was Void Under the Fifth Amendment Standards.

The State of Maryland, supported by the decision from which this appeal is taken, contends that jeopardy does not attach in a criminal prosecution where a defendant is first prosecuted on an invalid indictment. The respondent pitches its opposition to the petitioner's claim on the superficial distinction between a "valid" and "invalid" indictment, contending that double jeopardy attaches only where a "valid" indictment was brought against the petitioner and is inapplicable where the indictment, subsequent to the trial, and solely at the election of the petitioner, is declared "invalid". It is respectfully submitted that this argument is unsupportable both conceptually and factually under the circumstances of petitioner's case and conflicts with federal decisions regarding the consequences of prosecution on an "invalid" indictment. Petitioner also argues that the position adopted in this case by the Maryland courts is based upon a misconception of the meaning of its own precedent concerning double jeopardy. Finally, the

petitioner argues that there was no substantial difference between the "validity" of the indictment on which he was prosecuted and any ordinary error in proceedings which would warrant a reversal, and that double jeopardy attached to the same extent.

The respondent's "invalid" indictment argument overlooks the fact that for petitioner to set aside his conviction of burglary in the first case, it was incumbent upon him, under the terms of the "Order of Remand" of the Maryland Court of Appeals, to move the court to set aside the conviction. If, for any reason, petitioner had not chosen to move the court to set aside the conviction, it would have stood. Thus, as a matter of pure logic, it cannot be said that the petitioner was not subject to jeopardy under the first indictment. Moreover, petitioner appealed only his conviction for burglary, there being no other charge pending against him at the time, and the appellate court lacked jurisdiction to decide any more than was before it. Therefore, the Maryland Court of Appeals could not and did not remand more than was before it, e.g., the burglary conviction.

Of most significance is the fact that the holding of the Maryland Court of Appeals in petitioner's case contravenes federal decisions rendered on the "double jeopardy" principle. The landmark case, in support of petitioner's contention that jeopardy attaches regardless of the validity of the indictment is *United States* v. *Ball*, 163 U.S. 662 (1896). In 1889 Millard Fillmore Ball, John C. Ball and Robert E. Boutwell were prosecuted in the United States District Court for the Eastern District of Texas under an indictment charging that all three defendants "did shoot off and discharge the contents of said gun in and upon the

body of said William T. Box, inflicting thereon ten mortal wounds, of which mortal wounds the said William T. Box did languish and languishing, did die" (at p. 663). The jury found John C. Ball and Boutwell guilty, and acquitted Millard Fillmore Ball. The convictions were set aside because the indictment did not allege where and when Mr. Box died. Retrial was ordered because of the fatally defective indictment. The government pressed its case and all of the defendants, including Millard Fillmore Ball, who was previously acquitted, were again indicted. All defendants sought to take advantage of the "double jeopardy" plea. The Supreme Court affirmed the verdict of guilty, rendered in the second trial, as to the two defendants who had been found guilty in the first trial, but drew a distinction and reversed as to Millard Fillmore Ball who had been acquitted at the first trial. In its decision, the Court first reviewed the English authority which held that an acquittal on a defective indictment was insufficient to support a plea of "double jeopardy" and analyzed the only American authority on the subject, *People* v. *Barrett,* 1 Johns. 66, which was in accord with the English position. The Court did not choose to follow the *Barrett* decision but instead, adopted the cogent reasoning of Justice Livingstone, contained in the dissent of that case.

> "'That a party shall be deprived of the benefit of an acquittal by a jury, [because of a defective indictment] . . . coming too from the officer who drew the indictment, seems not to comport with that universal and humane principle of criminal law, "that no man shall be brought into danger more than once for the same offense." It is like permitting a party to take advantage of his own wrong. If this practice be tolerated, when are trials of an accused to end?'" (at pp. 667-8).

In deciding the issue, the *Ball* Court, at p. 669, said:

> "The Constitution of the United States, in the Fifth Amendment, declares, 'Nor shall any person be subjected to be twice put in jeopardy of life or limb.' The prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial."

In *United States* v. *Lewis*, 173 F. Supp. 674 (D.C.D. Colo. 1959) affd. 277 F.2d 378 (10th Cir. 1960), a case involving facts identical to those in the instant case, the defendant was convicted in his first trial on Counts I and V of the indictment which was reversed on the ground that the indictment under which he was charged "failed to state a public offense" and was therefore fatally defective. On retrial, the government charged the defendant with several charges, including one substantially similar to the ones on which he was acquitted under the previous defective indictment. Rebutting the defendant's contention of "double jeopardy", the State argued that when the Court of Appeals declared the original trial to be a nullity, the defendant "now stands before the court as if he had never been tried for any of the alleged offenses contained in the original indictment" (at p. 675). Relying on *United States* v. *Ball, supra,* the Court upheld the defendant's plea of "double jeopardy" and concluded that jeopardy attached upon a final judgment of acquittal regardless of the validity of the original indictment.

Green v. *United States,* 355 U.S. 184 is another case which supports petitioner's contention that his second trial was improper. In *Green* the jury returned a verdict of

guilty on second degree murder and thus tacitly acquitted the defendant of the charge of first degree murder; this Court held that a successful appeal from the second degree murder conviction did not constitute a waiver of the constitutional defense of former jeopardy to a second prosecution on the first degree murder charge (pp. 191-193). In *Green* the Court overturned (see dissent of Justice Frankfurter) its ruling in *Trono* v. *United States,* 199 U.S. 521 where the Court previously held that the accused, by his appeal, had waived his right to avail himself of the prior acquittal of a greater offense. In *Trono,* the Court, at page 533, said:

> "Would you not agree to the view that the accused has the right to limit his waiver as to jeopardy, when he appeals from a judgment against him. As the judgment stands before he appeals, it is a complete bar to any further prosecution for the offense set forth in the indictment. . . . no power can rest from him the right to so use that judgment, but if he chooses to appeal from it, . . . he thereby waives if successful, his right to avail himself of the former acquittal of the greater offense."

It seems that the Court's outmoded ruling in the *Trono* case is quite similar to the ruling of the Court of Special Appeals in the instant case. In the *Green* case, this Court, at page 193, in most forceful language, said:

> "Reduced to plain terms the government contends in order to secure the reversal of an erroneous conviction of one offense, a defendant must surrender his valid defense of former jeopardy not only on that offense but also on a different offense for which he

> was not convicted and which was not involved in his appeal. Or if stated in the terms of this case, he must be willing to barter his constitutional protection against a second prosecution for an offense punishable by death as the price of a successful appeal from an erroneous conviction of another offense for which he has been sentenced to five to twenty years in prison. As the Court of Appeals [the Circuit Court] said in its first opinion in this case, a defendant faced with such a 'choice' takes a 'desperate chance' in securing the reversal of an erroneous conviction. The law should not, and in our judgment, does not, place the defendant in such an incredible dilemma. Conditioning an appeal of one offense on a coerced surrender of a valid plea of former jeopardy on another offense exacts a forfeiture in plain conflict with the Constitutional bar against double jeopardy."

Counsel respectfully refers this Court to the statement made by the prosecutor in his opposition to the Motion to Dismiss the larceny count of the indictment on the grounds of "double jeopardy". It is interesting in that it appears that the prosecutor believed in the "gambling" theory clearly outlawed by the *Green* case.

The "double jeopardy" prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial. *United States* v. *Ball, supra.* Since the indictment in the instant case was voidable rather than void, and the petitioner had the option to set it aside, petitioner was clearly "put in jeopardy" at the first trial.

The *Green* case makes no exception in the case of a "valid" or "invalid" indictment. It makes no logical difference that a conviction is reversed for an "invalid" indictment as opposed to being reversed for any other error in the trial. What is significant is that the petitioner was placed in jeopardy at the first trial.

If the Court applies the Fifth Amendment to the States, the federal prohibition against "double jeopardy" will be applied to State prosecutions. It is submitted that the State of Maryland violated the federal standard for protection of petitioner's right to be free from "double jeopardy".

It is further submitted that in petitioner's case, the Special Court of Appeals of Maryland improperly applied the main case on which it relied, e.g., *Tate* v. *State,* 203 A.2d 882, 884, 236 Md. 312, 316 (1964). It is true that in the *Tate* case, the Maryland Court of Appeals said that jeopardy does not attach when a defendant is prosecuted on an "invalid" indictment. However, *Tate* involved a second prosecution after a successful appeal of a conviction, and not a retrial after acquittal. Of course, when a conviction is overturned by the Court of Appeals for error in the proceedings, the defendant is subject to reprosecution for the same offense for which he was previously convicted regardless of whether the error involves the trial proceedings or the indictment. *United States* v. *Ball, supra.* In this context, it appears that the principle of *Tate* v. *State, supra,* is not in conflict with any federal case ruling but that the language employed by that court exceeded the decision to which it was applied. It is respectfully submitted, therefore, that the Special Court of Appeals of Maryland misconceived the import of the *Tate* decision.

III.

The Petitioner Was Prejudiced by Standing Trial Wrongfully on the Larceny Charge Together With the Valid Charge of Burglary.

It may be argued by the respondent that since, as a result of the second trial, he received a lesser prison sentence for larceny than burglary, and since the sentences were to be served concurrently, rather than consecutively, that petitioner suffered no real prejudice by being re-tried on the larceny charge. It is respectfully submitted that the statements of Justice Fortas in his dissent in *Cichos* v. *Indiana*, 385 U.S. 76 (1966), disposes of this possible contention. The dissent reveals the realistic considerations of trial, and exposes the reason why prosecutors often will attempt to bring about a multiple count indictment. Therefore, counsel here quotes the pertinent portion of this Opinion in full. Justice Fortas said, at pages 81 and 82, that the wrongful inclusion of a less serious charge on which the defendant had been acquitted in a previous trial was materially harmful to the petitioner because:

> "First, it exposed him to the hazards of prosecution and conviction for the more onerous offense. Second, it again gave the prosecution the advantage of offering the jury a choice—a situation which is apt to induce a doubtful jury to find the defendant guilty of the less serious offense rather than to continue the debate as to his innocence."

Justice Fortas condemned the "heads you lose, tails you lose trial and appellate practice". Counsel admits that when the petitioner elected to be re-tried on the burglary

charge, the prosecutor compelled him to gamble against his will in a game in which petitioner had everything to lose and nothing to gain.

IV.

Petitioner Was Subjected to Double Jeopardy, in Another Form, When He Received a Greater Punishment for the Same Offense in the Second Trial.

After petitioner's second trial, he was sentenced to serve a substantially greater sentence, e.g., fifteen years in the second trial in contrast to ten years in the first trial, for the same burglary charge. The clear effect of this sentencing practice is to discourage citizens from exhausting their post-conviction remedies. Moreover, the increased sentencing practice compels a citizen to gamble with the government. The question here raised by petitioner, whether a harsher punishment following retrial for the same offense is prohibited by the "double jeopardy" clause, was recently considered in *Patton* v. *North Carolina,* 381 F.2d 636 (4th Cir. 1967), cert. denied, 88 S.Ct. 818 (1968). The Court at page 643 held:

> "Double jeopardy, rather than being a single doctrine, is actually comprised of three separate though related rules, prohibiting (1) reprosecution for the same offense following acquittal, (2) reprosecution for the same offense following conviction, and (3) *multiple punishment for the same offense.*" (Emphasis supplied.)

At page 646, the Court concluded:

> "To summarize, we conclude that increasing Patton's [defendant] punishment after the reversal of his ini-

tial conviction constitutes a violation of his Fourteenth Amendment rights in that it exacted an unconstitutional condition to the exercise of his right to a fair trial, arbitrarily denied him the equal protection of the law, and placed him twice in jeopardy of punishment for the same offense."

It is submitted that the *Patton* rationale is equally applicable to the petitioner's case.

Conclusion

For the foregoing reasons, the petitioner submits that his conviction for burglary and larceny should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 201

JOHN DALMER BENTON,
Petitioner,

v.

STATE OF MARYLAND,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 201

JOHN DALMER BENTON,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Court of Special Appeals of Maryland, A. 8 to 13, entered on August 17, 1967, is reported at 1 Md. App. 647, 232 A. 2d 541 (1967). Appellant sought certiorari from the Court of Appeals of Maryland which was denied without an opinion on December 7, 1967.

JURISDICTION

The jurisdictional requisites are adequately set forth in Petitioner's Brief.

QUESTIONS PRESENTED

1. Is the double jeopardy clause of the Fifth Amendment applicable to the States through the Fourteenth Amendment?

2. If so, was the Petitioner "twice put in jeopardy" in this case?

CONSTITUTIONAL PROVISIONS INVOLVED

1. Article Five of the Constitution of the United States of America:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; *nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;* nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation." (Emphasis supplied.)

2. Article Fourteen of the Constitution of the United States of America

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The Petitioner, on April 22, 1965, was indicted in the Circuit Court for Prince George's County in Criminal Trial No. 5595 for burglary, common law housebreaking and larceny. At trial, the State abandoned prosecution on the second count of the indictment, housebreaking, and the jury returned a verdict of guilty as to the first count, burglary, and not guilty as to the third count, larceny. Petitioner was sentenced on the burglary conviction to ten years in the Maryland House of Correction.

Thereafter, the Petitioner appealed to the Court of Appeals of Maryland, No. 469 September Term, 1965. That court remanded the conviction on the basis of *Schowgurow v. State*, 240 Md. 121, 213 A. 2d 475 (1965), and *State v. Madison*, 240 Md. 265, 213 A. 2d 889 (1965). In *Schowgurow*, the Court of Appeals held that because of this Honorable Court's decisions, the exclusion of persons from juries because they did not believe in God was invalid. By that decision, in all pending and future cases indictments by Grand Juries and criminal trials by Petit Juries selected under the exclusionary method formerly prescribed by Article 36 of Maryland's Declaration of Rights were declared defective. *State v. Madison, supra.* In *Schowgurow* and *Madison*, the Court of Appeals of Maryland did not hold that the Grand Jurors who indicted Schowgurow and Madison were not competent and qualified, nor did they hold in either case that the oaths administered to the jurors were unconstitutional or illegal because of their reference to God. It was only the fact that all prospective jurors were required to take the oath irrespective of their individual beliefs in God that under *Torcaso v. Watkins*, 367 U.S. 488, 81 S. Ct. 1680, 6 L. Ed. 2d 982 (1961) rendered the method of selection invalid. *Smith v. State*, 240 Md. 464, 214 A. 2d 563 (1965). Once it was established that the

method of Grand Jurors' selection was unconstitutional, any accused indicted by such a jury had the right to have the indictment dismissed. *State v. Madison, supra.* It was under these circumstances that the Petitioner exercised his right to timely challenge his first indictment which resulted in said indictment being rendered invalid.

Subsequently, on June 3, 1966, the Petitioner was reindicted in Case Number 6369 in the Circuit Court for Prince George's County, Maryland. He was again charged with burglary, common law housebreaking and larceny. At the trial on August 11, 1966, the State again abandoned prosecution of Count II of the indictment, to wit, common law housebreaking. Petitioner was tried on Count I, burglary, and Count III, larceny. The jury returned a verdict of guilty on both counts of the indictment, and he was sentenced to 15 years of imprisonment on Count I, burglary, and 5 years on Count III, larceny, the sentences to run concurrently.

From this judgment and sentence imposed by the Circuit Court for Prince George's County, Petitioner filed an appeal to the Court of Special Appeals of Maryland, at which time the following issues were argued:

A. Did Appellant's election to be re-indicted and his subsequent conviction constitute double jeopardy?

B. Was Appellant prejudiced as a result of the larceny charge?

C. Was there abuse of discretion by the trial court in failing to grant a removal of the case to another jurisdiction?

D. Could the trial court instruct the jury in mandatory terms not to infer guilt from the Appellant's refusal to testify?

The Court of Special Appeals of Maryland affirmed the lower court's findings on August 17, 1967, as per its opinion (A. 8 to 13), reported as *Benton v. State*, 1 Md. App. 647, 232 A. 2d 541 (1967). Petition for certiorari was denied without opinion by the Court of Appeals of Maryland on December 7, 1967.

On the 29th day of December, 1967, Petitioner filed a Petition for a Writ of Habeas Corpus, Civil No. 18872, in the United States District Court for the District of Maryland, setting forth the same six questions which were presented to this Honorable Court in his "Petition for Writ of Certiorari to the Maryland Court of Appeals". Action on said Petition had been held in abeyance by the court pending the Petitioner's exhaustion of available state remedies and the determination by the Court of Appeals of Maryland of the case of *Moon v. State*, 1 Md. App. 569, 232 A. 2d 277 (1967), on which said case the Court of Appeals of Maryland had granted certiorari from the Court of Special Appeals of Maryland. The *Moon* case raises the question presented by *Patton v. N. Car.*, 381 F. 2d 636 (4 Cir. 1967). The Court of Appeals of Maryland's opinion in the *Moon* case was filed on July 3, 1968, and is cited as ..... Md. ....., 243 A. 2d 564 (1968). At this writing, the Petitioner is seeking a hearing in the District Court on his Petition.

ARGUMENT

I.

The Double Jeopardy Clause of the Fifth Amendment Is Not Applicable to the States Through the Fourteenth Amendment.

That the "state" could not twice put a man in jeopardy for the same offense after an acquittal at a regular trial on an *adequate* indictment was well established at common

law. 2 Hawkins, *Pleas of the Crown*, 515 (8th ed. 1824); 2 Hale, *Pleas of the Crown*, 240-50 (1st Am. ed. 1847). In 4 *Blackstone's Commentaries*, it is said at p. 335:

> "[T]he plea of *autrefoits acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence. And hence it is allowed as a consequence, that when a man is once fairly found not guilty upon any indictment or other prosecution, before any court having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime."

This plea in bar was not available if the former indictment of process had been defective or the trial court had lacked jurisdiction because in such circumstances the accused "has not been in jeopardy." 4 Blackstone *Commentaries* 336 (3d Kerr Edition 1862).

In *Green v. United States*, 355 U.S. 184, 2 L. Ed. 2d 199, 78 S. Ct. 221 (1957), Justice Black, speaking for the majority of this Honorable Court, stated at page 189:

> "At common law a convicted person could not obtain a new trial by appeal except in certain narrow instances.[6] As this harsh rule was discarded courts and legislatures provided that if a defendant obtained the reversal of a conviction by his own appeal he could be tried again for the same offense.[7] Most courts regarded the new trial as a second jeopardy but justified this on the ground that the appellant had 'waived' his plea of former jeopardy by asking that the conviction be set aside.[8] Other courts viewed the second trial as continuing the same jeopardy which had attached at the first trial by reasoning that jeopardy did not come to an end until the accused was acquitted or his conviction became final.[9] But whatever the rationalization, this Court has also held that a defendant can be tried a second time for an offense when his prior conviction

for that same offense had been set aside on appeal. United States v. Ball, 163 U.S. 662, 41 L. ed. 300, 16 S. Ct. 1192.

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[6] See 1 Stephen, History of the Criminal Law of England, ch. x; United States v. Gilbert (CC Mass.) 2 Sumn 19, F. Cas. No. 15204, p. 1287.

[7] Under English law the appellate court has no power to order a new trial after any appeal except in certain cases where the first trial was a complete 'nullity,' as for example when the trial court was without jurisdiction over the person or subject matter. See 4 Stephen, Commentaries on the Laws of England (21st ed. 1950), 284. The English appellate court does have power to substitute a finding of guilt of a lesser offense if the evidence warrants, but it cannot find the defendant guilty of an offense for which he was acquitted or increase his sentence. See 10 Halsbury, Laws of England, Simonds ed. 1955), 539-541, and the cases cited there.

[8] See, e.g., Brewster v. Swope (C.A. 9th Cal.) 180 F. 2d 984 State v. McCord, 8 Kan. 232, 12 Am. Rep. 469; Cross v. Commonwealth, 195 Va. 62, 77 S.E. 2d 447; Smith v. State, 106 Wis. 102, 219 N.W. 270.

[9] See, e.g., State v. Aus, 105 Mont. 82, 69 P. 2d 584. Cf. Griffin v. Illinois, 351 U.S. 12, 18, 100 L. ed. 801, 898, 76 S. Ct. 585, 55 A.L.R. 2d 1055."

The basic common law principle of double jeopardy was incorporated into the Fifth Amendment to the Constitution of the United States. For a discussion of the history, significance and scope of said double jeopardy protection, see *Bartkus v. Illinois*, 359 U.S. 121, 150-155, 3 L. Ed. 2d 684, 79 S. Ct. 676 (1959) (Black, J., dissenting).

Prohibitions against double jeopardy are found in the constitutions of all but five States — Connecticut, Maryland, Massachusetts, North Carolina and Vermont. However, even though there is no prohibition in the State Con-

stitution prohibiting double jeopardy, protection against it is available in Maryland by way of the common law.

Prior to the adoption of the Fourteenth Amendment, there was no the slightest doubt that the first eight amendments, often referred to as the "Bill of Rights" applied to and limited the power of the federal government but were not applicable to the states. See *Barron v. Baltimore*, 7 Det 243 (1833); *Harris v. State*, 194 Md. 288, 71 A. 2d 36 (1950). Since the adoption of the Fourteenth Amendment, however, it has been held from time to time — more frequently in recent years than before — that under the due process clause of that amendment, certain basic or fundamental rights, some of which are specifically contained in the Bill of Rights, are protected from violation by the states.

In a comprehensive review of the relevant historical material surrounding the adoption of the Fourteenth Amendment, Justice Frankfurter speaking for the majority of this Honorable Court in *Bartkus v. Illinois*, at page 124, said:

> "We have held from the beginning and uniformly that the Due Process Clause of the Fourteenth Amendment does not apply to the States any of the provisions of the first eight amendments as such. The relevant historical opinions have been canvassed by this Court and by legal scholars. These materials demonstrate conclusively that Congress and the members of the legislatures of the ratifying States did not contemplate that the Fourteenth Amendment was a shorthand incorporation of the first eight amendments making them applicable as explicit restrictions upon the States."

Although it has never been accepted by this Court, several members of the Court have taken the position that the Fourteenth Amendment makes all of the provisions of

the Bill of Rights applicable to the States. See *Duncan v. Louisiana*, 36 L.W. 4414, ... U.S. ..... (concurring opinion, Black, J.); *Adamson v. California*, 332 U.S. 46, 71 (dissenting opinion, Black, J.); *O'Neil v. Vermont*, 144 U.S. 323, 366-370.

However, the most current view on the subject is *Duncan, supra*, where the Court maintained a trial by jury in criminal cases is fundamental to the American scheme of justice and held that the Fourteenth Amendment guarantees right of jury trial in all criminal cases which — were they to be tried in a federal court — would come within the Sixth Amendment's guarantee. The majority opinion, written by Justice White, stated at page 4415:

> "The Fourteenth Amendment denies the States the power to 'deprive any person of life, liberty, or property, without due process of law.' In resolving conflicting claims concerning the meaning of this spacious language, the Court has looked increasingly to the Bill of Rights for guidance; many of the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment. That clause now protects the right to compensation for property taken by the State [*Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897)]; the rights of speech, press, and religion covered by the First Amendment [*Fiske v. Kansas*, 274 U.S. 380 (1927)]; the Fourth Amendment rights to be free from unreasonable searches and seizures and to have excluded from criminal trials any evidence illegally seized [*Mapp v. Ohio*, 367 U.S. 643 (1961)]; the right guaranteed by the Fifth Amendment to be free of compelled self-incrimination [*Malloy v. Hogan*, 378 U.S. 1 (1964)]; and the Sixth Amendment rights to counsel [*Gideon v. Wainwright*, 372 U.S. 335 (1963)] to a speedy [*Klopfer v. North Carolina*, 386 U.S. 213 (1967)] and public [*In re Oliver*, 333 U.S. 257 (1948)] trial, to confrontation of opposing witnesses [*Pointer v. Texas*, 380 U.S. 400 (1965)], and

to compulsory process for obtaining witnesses [*Washington v. Texas*, 388 U.S. 14 (1967)].

"The test for determining whether a right extended by the Fifth and Sixth Amendments with respect to federal criminal proceedings is also protected against state action by the Fourteenth Amendment has been phrased in a variety of ways in the opinions of this Court. The question has been asked whether a right is among those ' "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," ' *Powell v. Alabama*, 287 U.S. 45, 67 (1932); whether it is 'basic in our system of jurisprudence.' *In re Oliver*, 333 U.S. 257, 273 (1948); and whether it is 'a fundamental right, essential to a fair trial,' *Gideon v. Wainwright*, 372 U.S. 335, 343-344 (1963); *Malloy v. Hogan*, 378 U.S. 1, 6 (1964); *Pointer v. Texas*, 380 U.S. 400, 403 (1965)."

But see the dissenting opinion of Mr. Justice Harlan, whom Mr. Justice Stewart joins in *Duncan, supra*.

While the broad language of *Duncan* and the cases cited therein indicate a strong future possibility of such incorporation, the protection against double jeopardy of the Fifth Amendment has never specifically been incorporated within the scope of the due process clause of the Fourteenth Amendment by this Court. It is conceded that in some circumstances, retrial would be so inconsistent with the concept of fundamental fairness as to be barred by the due process clause of the Fourteenth Amendment. A review of the double jeopardy decisions for the past thirty years — From *Palko* to *Cichos* — reveals that this Court has rejected the incorporation theory as to double jeopardy or has disposed of the cases on other ground. The central theme has been that "due process of law" requires only that criminal trials be fundamentally fair.

In *Palko v. Connecticut*, 302 U.S. 319 (1937), it was contended that the Fourteenth Amendment made all of the

specific guarantees of the Bill of Rights applicable to the states, but the Court rejected that idea and stated instead that certain of the privileges and immunities of the Bill of Rights had been taken over and brought within the Fourteenth Amendment by a process of absorption, namely, those that protect the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." In *Palko*, the defendant was indicted and tried for first degree murder and the jury returned a verdict of murder in the second degree. The State, alleging a prejudicial error of law, appealed the conviction. On appeal the conviction was reversed and a new trial was ordered. At the second trial, the objection of the defendant that he was being placed in jeopardy twice for the same offense in violation of the Fourteenth Amendment was overruled and the jury returned a verdict of murder in the first degree. The Court, in affirming the second conviction stated that the lack of protection afforded by the State of Connecticut against double jeopardy in such circumstances did not violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

Ten years after *Palko* the Court was again confronted with the question of whether a defendant was entitled to constitutional protection from state action because he had been twice placed in jeopardy. In *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), involving an unsuccessful execution and the desire to try again, four of the justices concluded that there was "no double jeopardy here which can be said to amount to a denial of federal due process in the proposed execution." Mr. Justice Frankfurter, concurring to form the majority, stated that "the Due Process Clause * * * expresses a demand for civilized standards which are not defined by the specifically enu-

merated guarantees of the Bill of Rights [in that they] * * * neither contain the particularities of the first eight amendments nor are they confined to them" and concluded that the state action in that case did not offend a principle of justice rooted in the tradition and conscience of the people.

The question of double jeopardy was raised again in *Gryger v. Burke*, 334 U.S. 728 (1948), by a petitioner who was convicted of being a multiple offender and was sentenced to life imprisonment in a state court. Again, the Court instead of saying that constitutional protection could not be invoked against the states in some cases of double jeopardy, decided that double jeopardy was not involved. Five years later in *Brock v. North Carolina*, 344 U.S. 424 (1953), where a motion for a mistrial was granted after witnesses for the state refused to testify, the Court answered the claim of the petitioner that his retrial amounted to double jeopardy by saying: "the pattern here * * * does not deny the fundamental essentials of a trial, 'the very essence of a scheme of ordered justice,' which is due process." Again the Court, although not rejecting the idea that due process imposes some limitations on the power of a state to reprosecute an individual for the same crime, restated the basic questions asked in *Palko, supra:*

> "Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our policy will not endure it? Does it violate those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions?"

and, in answering the questions in the negative, said:

> "As in all cases involving what is or is not due process, so in this case, no hard and fast rule can be laid down. The pattern of due process is picked out in the facts and circumstances of each case."

Hoag v. New Jersey, 356 U.S. 464 (1958), and *Ciucci v. Illinois*, 356 U.S. 571 (1958), involved the problems of successive prosecutions by the two states of several robberies in the first case, and homicides, in the second, arising out of single occurrences. In these cases, the Court recognized that the Fourteenth Amendment does impose some limitations on the state in the area of double jeopardy, but stating that "the question in any given case is whether [the course followed] has led to fundamental unfairness," refused to grant constitutional protection from the states' actions because there was no showing that due process had been violated.

More recently, in *Bartkus v. Illinois, supra*, where a state prosecution followed an acquittal in a federal district court for the same offense — robbing a federally insured savings and loan association — a majority of the Court acknowledged the fact that the attack on the constitutionality of the state's action rested on the due process clause of the Fourteenth Amendment since that clause "does not apply to the States any of the provisions of the first eight amendments *as such*," but based their decision on the premise that crimes committed by the same act against two sovereignties were different crimes. The Court, however, at p. 127 of 359 U.S., quoted the statement of Justice Cardozo in *Palko, supra:*

> "'In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.' 302 U.S., at 324-325."

and concluded that "decisions under the Due Process Clause require close and perceptive inquiry into fundamental principles of our society."

The Court dismissed a writ of certiorari as improvidently granted, without reaching the issue whether the Fifth Amendment's prohibition against double jeopardy is applicable to state court prosecutions under the due process clause of the Fourteenth Amendment in *Cichos v. Indiana, supra.* In an opinion by Mr. Justice White, it was held that the retrial of the petitioner for involuntary manslaughter did not place him twice in jeopardy since under Indiana law, the jury's silence at first trial with respect to involuntary manslaughter did not amount to an acquittal on such charge.

In the *Palko* to *Cichos* line of cases, the Court avoided the broader question of whether the due process clause of the Fourteenth Amendment imposed any restrictions on a state's power to reprosecute an individual for the same crime by delineating the narrower question whether this particular "kind of double jeopardy" exceeded the limits imposed upon the states by the due process clause of the Fourteenth Amendment. In articulating the "rationalizing principle" of the due process clause, Mr. Justice Cardozo in *Palko* perceived: the due process clause of the Fourteenth Amendment prohibited the states from enforcing their criminal laws at the cost of violating some fundamental precept of justice imposing a "hardship so acute and shocking that our policy will not endure it." It is submitted that the criteria to be applied in double jeopardy case is that "due process of law" requires only that the Petitioner not be denied any element of fundamental procedural fairness.

It has been recognized that certain of the restrictions emanating from the double jeopardy provision of the Fifth Amendment are, unlike many of the provisions of the Bill of Rights already absorbed, "technical ramifications," *Brock v. State of North Carolina, supra,* at 345 (Vinson, C.J., (dis-

senting) and that some of the cases involving that provision turn on "subtle technical controversies," id., at 428, 73 S. Ct. 349 (Frankfurter, J., concurring), "engendered by technical aspects of double jeopardy as enshrined in the Fifth Amendment," *State of Louisiana ex rel. Francis v. Resweber, supra* (Frankfurter, J., concurring). Moreover, Justice Goldberg's concurrence in *Pointer v. State of Texas*, 380 U.S. 400 (1965), announcing his acceptance of the process of absorption, find this process to be conceived in *Palko* — which is both consistent and suggestive of a version of the doctrine of selective incorporation which permits only the basic core of the Double Jeopardy Clause of the Fifth Amendment to be absorbed by the Fourteenth Amendment.

In view of the diverse reasoning by many of the states concerning double jeopardy, it does not appear that the federal standard of double jeopardy can be deemed so fundamental a concept of ordered liberty as to compel a total revision of state interpretations of the doctrine, which interpretations of their own constitutions, statutes and common law are primarily the prerogative of the states. Mr. Justice Harlan in his dissenting opinion in *Duncan*, stated at page 4422:

> "The States have always borne primary responsibility for operating the machinery of criminal justice within their borders, and adapting it to their particular circumstances. In exercising this responsibility, each State is compelled to conform its procedures to the requirements of the Federal Constitution. The Due Process Clause of the Fourteenth Amendment requires that those procedures be fundamentally fair in all respects. It does not, in my view, impose or encourage nationwide uniformity for its own sake; it does not command adherence to forms that happen to be old; and it does not impose on the States the rules than

may be in force in the federal courts except where such rules are also found to be essential to basic fairness."

In summary, the question is not whether double jeopardy is an ancient principle of law, which it is; nor whether it played a significant role in the administration of criminal justice, which it does; nor whether it will endure, which it shall. The question in this case is: Did Petitioner's election to be re-indicted and his subsequent conviction constitute double jeopardy by the State of Maryland? On the basis of the historical background of double jeopardy, the present interpretation of that principle, the facts of the instant case, and the procedural safeguards employed by the Courts of Maryland, the answer must be in the negative.

For the several reasons here advanced, the double jeopardy clause of the Fifth Amendment is not applicable to the states through the Fourteenth Amendment.

II.

The Petitioner Was Not "Twice Put In Jeopardy" In This Case.

Assuming, *arguendo*, that the double jeopardy clause of the Fifth Amendment was applicable to the states through the Fourteenth Amendment, it is the Respondent's contention that under the circumstances of the instant case the Petitioner's rights under the double jeopardy clause were not violated.

The basic common law principle of double jeopardy was incorporated in the Constitutions of most of the states, Maryland being one of the notable exceptions. However, even though there is no provision in the State Constitution prohibiting double jeopardy, protection against it is available in this State by way of the common law. See *Ford v. State*, 237 Md. 266, 269, 205 A. 2d 809 (1965); *Wampler*

v. Warden, 231 Md. 639, 645, 191 A. 2d 594 (1963); *Bennett v. State,* 229 Md. 208, 212, 182 A. 2d 815 (1962); *Moquin v. State, supra; Eggleston v. State,* 209 Md. 504, 513, 121 A. 2d 698 (1956); *State v. Adams,* 196 Md. 341, 344, 76 A. 2d 575 (1950); *Robb v. State,* 190 Md. 641, 650, 60 A. 2d 211 (1948).

In an early case — *Hoffman v. State,* 20 Md. 425 (1863), where a jury, after being sworn and charged to try the accused was dismissed because the witness did not appear, and, on the second trial, the accused was convicted and sentenced — our predecessors, in adopting the interpretation of the United States' Courts that the Fifth Amendment clause stating that no person shall be "subject for the same offense to be twice put in jeopardy" (being a 'maxim imbedded in the very elements of the common law') meant nothing more than "that where there had been a final verdict either of acquittal or conviction, on an *adequate indictment,* the defendant could not be a second time placed in jeopardy for the particular offense," held that the accused, not having been twice put in jeopardy, was not entitled to be discharged.

In conformity with the common law rule, it has been repeatedly held in the State of Maryland that when a traverser has been tried on an indictment or information that is invalid, he is not in jeopardy and he may be indicted and tried again. *Tate v. State,* 236 Md. 312, 203 A. 2d 882 (1964); *State ex rel Shatzer v. Warden,* 192 Md. 728, 64 A. 2d 711 (1949); *Kenny v. State,* 121 Md. 120, 87 A. 1109 (1913); *Stearns v. State,* 81 Md. 341, 32 A. 282 (1895). Since the first indictment was ruled invalid, the case at bar falls clearly within the rule set forth in the above cases. It is stating the obvious that if an indictment is invalid, all counts of said indictment are invalid.

The Federal and Maryland Law on the aspect of double jeopardy at issue is apposite. The Petitioner relies on the case of *United States v. Ball,* 163 U.S. 662 (1896), which is distinguishable on the facts from the instant case insofar as it concerned a defective or deficient indictment rather than an invalid indictment, which deprives the Court of jurisdiction. In *Ball, supra,* an indictment had been returned against three defendants charging first degree murder; two of the defendants were found guilty, and the third was acquitted. The two appealed, and this Court held the indictments deficient to support the conviction and reversed. A new indictment was returned against all three; the two who had been found guilty pled former jeopardy, and third defendant pled former jeopardy and a verdict of acquittal. The trial court overruled all those pleas. Upon trial, a verdict of guilty was returned against all three. This Court affirmed the verdict of guilty as to the two defendants who had been found guilty in the first trial, but reversed as to the one who had been acquitted. However, the Court stated at pages 669-670, with approval, the rule followed by Maryland in the case at bar.

> "The Constitution of the United States, in the 5th Amendment, declares: 'Nor shall any person be subject to be twice put in jeopardy of life or limb.' The prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial. An acquittal before a court having no jurisdiction is, of course, like all proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offense. *Com. v. Peters,* 12 Met. 387; 2 Hawk. P.C. Chap. 35, §3; 1 Bishop, Crim. Law, §1028. But although the indictment was fatally defective, yet, if the court had jurisdiction of the cause and of the party, its judgment is not void, but only voidable by writ of error; and, until so avoided, cannot be collaterally impeached."

It was stated in *Wolkoff v. United States*, C.C.A. Ohio, 84 F. 2d 17 (1936) at page 17 that two of the essentials of legal jeopardy are that the court have jurisdiction, and that the indictment be valid. Where the indictment or information is so defective in form or substance that it will not support a conviction, it cannot form the basis of proceedings which will put accused in jeopardy and bar another prosecution. Corpus Juris Secundum, *Criminal Law*, §246-Footnote 65.

In *United States v. Lewis*, 173 F. Supp. 674 (D.C.D., Colorado, 1959) cited by the Petitioner, Lewis was convicted under counts 1 and 5 and acquitted under counts 2 and 3 of an indictment. Upon appeal on counts 1 and 5, judgment was reversed on the ground that the indictment failed to state a public offense. He was reindicted under several counts, including one similar to count 2 in his original indictment, of which he had been acquitted. Lewis pled double jeopardy and his plea was sustained. It is to be noted that the indictment in said case was held to be fatally defective for failure to state a public offense; hence it did not deprive the trial court of jurisdiction.

The declaration of the Fifth Amendment that "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury," is jurisdictional; and no court of the United States has authority to try a prisoner without indictment or presentment in such cases. It follows that an invalid indictment would deprive the court of jurisdiction. See *Ex Parte: In the Matter of Bain*, 121 U.S. 849 (1887).

It is interesting to note that the Court of Appeals of Maryland, in applying the principle of double jeopardy in the *Barger* case — a factual situation similar to that in *Green v. United States, supra*, reached the same conclusion.

In *Barger*, the defendant at a regular trial on a valid indictment was found not guilty of murder in the first degree and guilty of murder in the second degree. The conviction was appealed, and the Court of Appeals in *Barger v. State*, 235 Md. 556, 202 A. 2d 344 (1964), reversed the judgment and remanded the case for a new trial because the trial court erred in denying an advisory instruction with regard to the right of the accused to assert the defense of self-defense. Upon retrial under the original indictment, the lower court sustained the defendant's objection to being tried "as to murder in the first degree" and the Court of Appeals affirmed the holding that the acquittal of the defendant of murder in the first degree at the original trial barred his retrial for that offense at the new trial for murder in the second degree. Since *Green* and *Barger* were predicated on valid indictments they are distinguishable from the instant case which is based upon an invalid indictment at the option of the Petitioner.

The invalidity of the Petitioner's First indictment, trial and conviction was predicated on the following decisions of the Court of Appeals of Maryland, implemented by court order, upon which the Petitioner exercised his option.

Schowgurow v. State, supra, held that the provision of Article 36 of the Maryland Declaration of Rights requiring a belief in God as a qualification for service as a grand or petit juror was in violation of the Fourteenth Amendment to the Constitution of the United States and that a jury selected in accordance with Article 36 was improperly constituted. *Schowgurow*, the Court of Appeals ordered, was not to apply retroactively except for convictions which had not become final when the opinion was rendered.

State v. Madison, supra, held that any accused indicted or convicted by such an improperly constituted jury had the right to have the indictment dismissed or his case retried without showing actual prejudice. *Smith v. State, supra,* held that there could be an intelligent and knowing waiver of the defects in an indictment or conviction by such an improperly constituted jury.

In *Hays and Wainwright v. State,* 240 Md. 482, the Court of Appeals ruled that there need have been no challenge or objection below to such a defective indictment in order to take advantage of the constitutional defects.

In this context the Court of Appeals then ordered that the docket entries in all criminal cases in which an appeal had been noted but not perfected by the transmission of the record be sent to the Court; the Court then remanded all such cases and all the criminal appeals that had been pending in the Court, subject to identical orders that in each such case the accused could void the technically invalid indictment or the technically invalid jury verdict, or elect to go forward with the pending appeal as if the indictment or verdict were valid. To accomplish this, the following procedures were ordered:

1. The accused was to be brought into the trial court, with his counsel present, to ascertain whether he "desires to avail himself of the relief afforded by the rulings * * * [of the Court of Appeals in the above cases], or whether * * * [he] elects to waive any objections now available to him [under those decisions] * * *."

2. The accused is to be informed of his right to attack his conviction and of the fact that the court would vacate the indictment or conviction, if he moved them to do so.

3. The accused is to be advised that he is subject to re-indictment and retrial, if he elects not to abide by his present status.

4. The accused "should likewise be advised that if he be reconvicted any new sentence to be imposed might be greater or less than the one, or ones, presently against him," within maximum limits.

5. The accused is to be told that he can waive any defects in the grand or petit jury which indicted or convicted him, notwithstanding the unlawful composition of such jury.

6. If the accused elects to accept the indictment or trial jury as valid, the appeal will proceed in the Court of Appeals in the usual way, on the other grounds of error claimed.

In the case at bar, as in other similar cases, the Petitioner was given the messages the Court of Appeals said should be given him. He chose after an appropriate period of deliberation to have his indictment nullified.

This, on the record, was an intelligent, knowing and formal choice, made with the understanding and agreement that his original indictment would be declared invalid and that he could be reindicted and upon reconviction he might receive an increased sentence to which he could not object if it were otherwise in order.

There was no constitutional necessity to make *Schowgurow* retroactive at all. *Johnson v. New Jersey*, 384 U.S. 719, 16 L. Ed. 2d 882 (1966). Exercising its discretion, the Court of Appeals chose to make it retroactive to all whose convictions had not become final.* In so doing, the Court,

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* As a result 221 cases pending on appeal in the Court of Appeals of Maryland were remanded to the lower court so that the accused could exercise his or her option to be reindicted. *Statistics of the Administrative Office of the Courts.* Far more numerous were the cases at various stages in the criminal courts of the counties of the State. While no accurate statistics are available, in one jurisdiction alone — Baltimore City — 1061 reindictments were secured through the years 1966 and 1967. *Report of the State's Attorney for Baltimore City 1965-66 and 1966-67.*

in effect, attached the condition that under the peculiar and limited circumstances, if an accused accepted the benefits of *Schowgurow's* selective retroactivity, he assumed the risk of being reindicted, convicted and that his next sentence might be greater than the one he was voiding.

The reason for the defense of double jeopardy at common law and in the constitutional and statutory provisions incorporating the common law concept was to prevent the citizen from vexatious criminal prosecutions by the institution by prosecutors of additional prosecutions for the crime for which the accused had been formerly acquitted or convicted. It was not designed to defeat the principal purpose of the criminal law, which, apart from its reformatory effect, is designed to protect society and to prevent crime. When the Petitioner exercised his option to void his original indictment within constitutional and procedural safeguards outlined by the Court of Appeals, the indictment became a nullity and the case proceeded as if the first indictment, trial, conviction, and acquittal had never been had. Said indictment was not *partly valid* and *partly invalid*. Each count of the indictment was invalid. Hence, the conviction and acquittal on the counts were not valid in part and invalid in part.

Furthermore, there is no reason in logic or justice to permit the Petitioner to maintain that one count of his original indictment is invalid but, at the same time, assert that the other count of it is valid and affords him protection. The Petitioner had the advice of counsel in regard to the problems which would be presented by exercising his option and it would appear not to put any abnormal or unjust burden upon him to determine what his best interest required so far as a new indictment was concerned.

On the contrary, it would appear that to permit the Petitioner to avail himself of the favorable part of his indict-

ment and to challenge the unfavorable portion, places the State of Maryland in an unfair and unjust position both theoretically and practically.

Articulation of the policies to be served by the double jeopardy provision should not obscure the presence of an important countervailing consideration, the interest of society in preventing the guilty from going unpunished. While overemphasis of this factor may lead to abuse and a deprivation of the rights of the accused, in circumstances where the risk of harrassment is slight and that of improper acquittal is great, the State's interest in securing convictions should be given considerable weight.

The invocation of the Fifth Amendment bar to the instant case "would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double jeopardy prohibition is aimed." *Wade v. Hunter*, 336 U.S. 684, 688-89 (1949). Furthermore, the initial indictment of the Petitioner was terminated by his own action because of a relatively objective "breakdown in judicial machinery." (See *Gori v. United States*, 367 U.S. 364, 370 (1961) (Douglas, J., dissenting)), rather than because of improper conduct on error on the part of the prosecutor or judge. Hence, double jeopardy should not apply. In addition, the action of the Petitioner in nullifying his original indictment, trial and conviction, under the circumstances must be construed as consenting to termination of the former proceedings. (See *Gori v. United States*, *supra*, Note 58 at 370 (Douglas, J., dissenting)).

Considering all the facts and the applicable law pertaining thereto, the Petitioner was not "twice put into jeopardy."

III.

The Petitioner Was Not Prejudiced By Standing Trial on the Larceny Charge Together with the Charge of Burglary.

While the Petitioner concedes that the charge of burglary was valid, he raised the issue in the Court of Special Appeals of Maryland that he was prejudiced as a result of the larceny charge. In support thereof he argued that the fact that the judge at his second trial imposed a greater sentence than the one received at his first trial "evinces the prejudicial effect which the prosecution for larceny together with burglary must have had upon the court." Other than this bald allegation, he cited no cases on point in support of this nominal proposition, nor does he explain why this prejudicial effect resulting in a greater sentence would only occur at the second trial and not at the first trial, when the record indicates that he was tried on the larceny count at both trials.

Assuming, arguendo, that the second indictment larceny count was invalid, the statement of Justice Fortas in his dissent in *Cichos, supra,* as quoted in the Petitioner's brief, is inapposite. In the case at bar, Petitioner was not exposed to the hazards of prosecution and conviction for a more onerous offense but a less onerous offense, and while one may speculate that a two count indictment offers a jury a choice, in the case at bar, unlike *Cichos, supra,* the jury disposed of this contention by finding a verdict of guilty on both counts.

IV.

Petitioner Was Not Subjected To Double Jeopardy in Another Form When He Received A Greater Punishment For The Same Offense In The Second Trial.

A review of the record in the instant case will indicate that the issue of increased punishment was not raised in

the Court of Special Appeals of Maryland and hence it is not before this Honorable Court. *Ellis v. Dixon,* 349 U.S. 458, 99 L. Ed. 1231, 75 S. Ct. 850 (1955), rehearing denied 350 U.S. 855, 100 L. Ed. 759, 76 S. Ct. 37 (1955); Title 28, Rule 19, Revised Rules of the Supreme Court of the United States. Furthermore, in the Petition for Writ of Certiorari to the Court of Special Appeals of Maryland, Petitioner maintained that to increase punishment after a successful appeal amounted to cruel and unusual treatment. Now, in the sunshine of appellate review, and in order to crawl under the cover of the limitations of said review, he maintains that said increase in punishment was double jeopardy, relying on *Patton v. N. Car.,* 381 F. 2d 636 (1967), cert. denied.

In *Patton,* the court said the question to be answered was whether a defendant may be sentenced to a longer term of imprisonment at his second trial than he received after his first conviction, vacated on constitutional grounds. Its answer was than under no circumstances can he be. Three reasons were given — denial of due process, lack of equal protection, and double jeopardy. The due process clause of the Fourteenth Amendment, said the court, does not permit the "fiction" that a reversal on appeal wipes out all that went before, and that by appealing, the accused is deemed to have assumed the risk of a greater sentence. As to double jeopardy, the court stated at pages 643-644, 645-646:

> "Double jeopardy, rather than being a single doctrine, is actually comprised of three separate though related rules, prohibiting (1) reprosecution for the same offense following acquittal, (2) reprosecution for the same offense following conviction, and (3) multiple punishment for the same offense. * * *."
>
> * * * * * *
>
> "* * * Thus, unless a defendant is held to waive this double jeopardy protection in seeking a new trial, a

harsher penalty may not be imposed. And we have already declared, in Part II of this opinion, that we decline to predicate a prisoner's exercise of his right to seek a new trial on the fiction that he has 'waived' the benefits of his initial sentence, because of the restrictive effect this has on access to post-conviction remedies."

In its opinion dated July 3, 1968 in *Moon v. State*, ... Md. ....., 243 A. 2d 564 (1968), the Court of Appeals of Maryland considered the *Patton* case. The factual situation of *Moon* was that the defendant was convicted of armed robbery and sentenced to twelve (12) years. *Schowgurow, supra,* gave him the opportunity to elect to have his indictment nullified, and he did. On retrial he was again found guilty of armed robbery and also of larceny and intent to murder, for which he had not been tried the first time. The lower court sentenced him to twenty (20) years for armed robbery, with credit for the time he had served, and suspended ten (10) year sentences on each of the other counts. The Court of Special Appeals of Maryland affirmed the judgment and sentences (*Moon v. State,* 1 Md. App. 569) on the authority of *Hobbs v. State,* 231 Md. 533, cert. denied 375 U.S. 914 (1963) in which the Court of Appeals of Maryland held that after the convicted man had won a reversal the judge on reversal could impose a greater punishment than had been previously imposed. The Court of Appeals stated:

"We perceive no present constitutional obstacle to continuing to follow the flat rule laid down in *Hobbs.* The Supreme Court has not disturbed increased sentences on retrial. It did not do so in *Hobbs.* See also *Stroud v. United States,* 251 U.S. 15, 64 L. Ed. 103 (1919) (in which, on retrial, a death sentence replaced a life sentence given at the first trial); *Robinson v. United States* (6th Cir. 1944), 144 F. 2d 392, *aff'd* 324 U.S. 282, 89 L. Ed. 944 (1945) (a death sentence re-

placed a life sentence). See also *Green v. United States*, 355 U.S. 184, 194, 2 L. Ed. 2d 199, 208 (1957), Note 15 (in which a jury's finding of second degree murder was held to be an implied acquittal of first degree murder which precluded again putting the accused in jeopardy for first degree murder) — 'Stroud * * * is clearly distinguishable'; *Cichos v. Indiana*, 385 U.S. 76, 17 L. Ed. 2d 175 (1966). In *United States v. Tateo*, 377 U.S. 463, 12 L. Ed. 448 (1964), both *Stroud* and *Robinson* are cited as existing and viable authority. The Supreme Court denied certiorari in *Patton*, 390 U.S. 905 (1968), but at 389 U.S. 889 it also denied it in *United States ex rel. Starner v. Russell* (3rd Cir. 1967), 378 F. 2d 808, which had refused to follow *Patton* and had reached an opposite result.

"We are unpersuaded that *Patton* is sound. There the Court enacted a flat prophylactic rule which it rationalized as constitutionally required, seemingly because it was convinced that out of bitterness, bias, spite or prejudice state judges on retrial would give increased sentences which bore no proper relation to the fair administration of justice, and that in the rare instances in which this was not so, the second sentences could not be found from the record not to have reflected such prejudice or improper motives. This attitude of knowing judicial pragmatism led to the Procrustean holding, which we think is unwarranted and undesirable in its absolute inflexibility.

"No appellate court to our knowledge has followed *Patton* in finding a constitutional necessity for entire inflexibility,[1] although if reliance is put on double jeopardy this result is almost inevitable. See Van Alstyne, *In Gideon's Wake: Harsher Penalties and the 'Successful' Criminal Appellant*, 74 Yale L.J. 606, 611 (1965); see also *Retrial of the Successful Criminal Appellant: Harsher Punishment and Denial of Credit for Time Served*, 28 Md. L. Rev. 64 (1968).

"[1] California, Oregon and New Jersey Courts have reached similar conclusions essentially as a matter of

procedural fairness under state law. See People v. Henderson (Cal. 1963), 386 P. 2d 677; State v. Turner (Ore. 1967), 429 P. 2d 565; State v. Wolf (N.J. 1966), 216 A. 2d 586."

The Court of Appeals went on to state that various federal courts had rejected the view *Patton* took and had refused to follow its holdings. See *United States v. Ellenbogen* (2nd Cir. 1966), 365 F. 2d 982, referred to in *Coke v. United States* (S.D.N.Y. 1968), 280 F. Supp. 97, 102; *United States ex rel. Starner v. Russell* (3 Cir. 1967), 378 F. 2d 808, 810, 811-12, cert. denied 389 U.S. 889 (1967); *United States v. White* (7 Cir. 1967) 382 F. 2d 445, 448. Other similar holdings and rejections of *Patton* include *United States v. Sanders* (E.D. Cal. 1967), 272 F. Supp. 245; *Rice v. Simpson* (M.D. Ala. 1967), 274 F. Supp. 116; *United States ex rel. Davis v. Brierly* (M.D. Pa. 1967), 274 F. Supp. 1006, 1007 — "Patton is not the law in this circuit"; *United States v. Fairhurst* (3 Cir. 1968) 388 F. 2d 825; *State v. Brown* (N.C. 1967), 156 S.E. 2d 272; *Salisbury v. Grimes* (Ga. 1967), 158 S.E. 2d 412; *State v. Jacques* (Super. Ct. N.J. 1968) 239 A. 2d 252.

There was no constitutional, to wit double jeopardy, bar to the giving of increased sentence and a review of the record would support factually its permissibility and propriety.

CONCLUSION

For the foregoing reasons, the Respondent submits that the convictions of the Petitioner should be affirmed.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 201

JOHN DALMER BENTON,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE MARYLAND COURT OF APPEALS

SUPPLEMENTARY BRIEF FOR THE PETITIONER

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Background and Question Presented

This case was argued before the Court on December 12, 1968, on the issue of whether "[T]he double jeopardy clause of the Fifth Amendment is applicable to State criminal proceedings through the Fourteenth Amendment." On December 16, 1968, the Court entered the following Order:

> "This case is restored to the docket for reargument on March 24, 1969, limited to the following question, not specified in original Writ:

> Does the 'concurrent sentence doctrine' enunciated in *Hirabayashi* v. *United States,* 320 U.S. 81, 105, and subsequent cases, have continuing validity in light of such decisions as *Ginsberg* v. *New York,* 390 U.S. 629, 633, no. 2, *Peyton* v. *Rowe,* 391 U.S. 54, *Carafas* v. *Lavallee,* 391 U.S. 234, 237-238, and *Sibron* v. *New York,* 392 U.S. 40, 50-58?"

In this Supplementary Brief, counsel will undertake to answer the Court's question. However, it is respectfully submitted that in the instant case, the Court need not reach the certified question for the following reasons. The "Hirabayashi—concurrent sentence doctrine" pre-supposes a situation where more than one conviction is obtained in a single trial, and at least one of the convictions is valid. However, in this case, both convictions are invalid and both should therefore be vacated. Thus, in this Supplementary Brief, counsel will first seek to outline the reason why both convictions should be reversed.

ARGUMENT

I.

(A) The Doctrine of Res Judicata, as Well as Double Jeopardy, Is Applicable to Criminal Cases and Operates to Conclude Those Matters in Issue Which Have Been Determined by a Previous Verdict.

In the first trial petitioner was prosecuted for burglary and larceny (A. 1). He was found guilty of burglary and not guilty of larceny (A. 1). Both verdicts were rendered by the jury after deliberation on the evidence. The first jury actually and necessarily adjudicated the question of

whether the petitioner, defendant, took and carried away the complaining witness' personal property. This is an essential element of larceny.[1] Although a transcript of the testimony of the first trial is not available, this assertion is supported by the evidence adduced at the second trial, the general remarks made at that second trial, and the record entries made by the trial court in both trials.

Notwithstanding the jury's adjudication that the petitioner did not take and carry away the complaining witness' personal property, the court allowed the petitioner to be tried again for larceny and permitted the prosecution to put on the same evidence which was used in the larceny charge in the first trial. The evidence consisted of testimony from the complaining witness that after petitioner left his premises, he discovered certain items of personal property missing (Record, pp. 124, 125, and 126). It is submitted that the wrongful admission of evidence of larceny in the second trial, vitiated petitioner's conviction of burglary.

A previous judgment, between the same parties, is conclusive as to those matters actually and necessarily adjudicated therein. *Tait* v. *Western Maryland Ry.*, 289 U.S. 620. This Court has ruled that evidence, tending to prove the commission of a crime of which a defendant was previously found not guilty is inadmissible in a new trial. In *Sealfon* v. *United States*, 332 U.S. 575, the Court said:

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[1] "Larceny" under the common law of Maryland, is a felonious taking and carrying away of the personal property of another with intent to deprive the owner of the property permanently. *Fletcher* v. *State*, 231 Md. 190, 189 A2d 641 (1963).

Burglary is defined in Article 27, Sec. 30, of the Maryland Code. "(a) Every person, . . . who shall break and enter any dwelling house in the nighttime with the intent to steal . . . shall be guilty of burglary."

> "But res judicata may be a defense in a second prosecution. That doctrine applies to criminal as well as civil proceedings . . . and operates to conclude those matters in issue which the verdict determined though the offenses be different." 332 U.S. 578.

This principle of *res judicata* is a "fundamental principle of justice" and therefore applies to State criminal proceedings through the Fourteenth Amendment due process of law clause. *United States* v. *Oppenheimer*, 242 U.S. 85, 88.

Clearly, the jury in the second trial was erroneously allowed to consider irrelevant and incompetent evidence presented by the prosecution. The petitioner was thereby denied a basically fair trial. As recently said by this Court, "An important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence." *Bruton* v. *United States*, decided May 20, 1968, —— U.S. ——, 88 S.Ct. 1620. In a case involving admission of evidence, it was said, "The trial judge should, in an exercise of sound discretion, exclude evidence tending to show commission of other crimes where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it." *United States* v. *Kahner*, 317 F2d 459, 472 (2nd Cir. 1963).

It is submitted that in this case, it is impossible to accurately determine whether the burglary conviction was or was not brought about, or influenced, by the jury's consideration of the irrelevant and incompetent testimony of larceny. Therefore, the burglary conviction should be reversed. *Washington* v. *United States*, 126 U.S.App.D.C. 389, 379 F2d 166. Of course, the larceny conviction should be reversed because it was obtained in violation of petitioner's right not to be twice put in jeopardy.

(B) Injecting the Larceny Charge Into the Trial Proceedings Was Fundamentally Unfair and a Denial of Due Process of Law.

Petitioner contends that even if he had not been able to point out exact reasons, as he did above, why trying the invalid larceny charge with the valid burglary charge prejudiced the entire trial and requires reversal of both convictions, that he would still be entitled to the requested relief because on its face such a trial is unfair and a denial of due process required by the Fourteenth Amendment. He argues that the mere injecting of the improper larceny charge, which was gained by violating petitioner's Fifth Amendment double jeopardy rights into the trial proceedings, tainted everything that occurred therein with fundamental unfairness. In *Estes* v. *State of Texas,* 381 U.S. 544, and *Sheppard* v. *Maxwell,* 384 U.S. 333, where there was television coverage of the trial within the courtroom and uncontrolled pre-trial publicity, respectively, this Court struck down the conviction because of the *probability* of unfairness. In both cases, even though the Court enumerated possible reasons why the publicity made the trials improper, the Court concluded that if the act complained of involved a probability of prejudice or unfairness then the conviction must be reversed. The Court stated it as follows in *Estes*:

> "The State, however, says that the use of television in the instant case was 'without injustice to the person immediately concerned,' basing its position on the fact that the petitioner has established no isolatable prejudice and that this must be shown in order to invalidate a conviction in these circumstances. The State paints too broadly in this contention, for this Court

itself has found instances in which a showing of actual prejudice is not a prerequisite to reversal. This is such a case."

See also, *Rideau* v. *State of Louisiana,* 373 U.S. 723, and *Turner* v. *State of Louisiana,* 379 U.S. 466, where this Court went beyond consideration of the actual effect of the excessive pre-trial publicity, and struck down the conviction on the ground that unfairness was inherent in it. And, again in *Gideon* v. *Wainwright,* 372 U.S. 335, and *White* v. *State of Maryland,* 373 U.S. 59, where the Court reversed convictions because of the basic unfairness involved in denying counsel to the defendants in the pre-trial and trial proceedings. In neither of these cases did the Court concern itself with the precise effect which denial of counsel had upon the petitioners, but only with the fact that it was unfair. From the foregoing cases one reaches the conclusion that if prejudice is injected into the trial or if prejudice arises during trial that probably affects the fairness of the trial, then due process of law requires a reversal of any conviction that may result. It would not seem to make any difference what the unfairness consisted of, uncontrolled pre-trial publicity, live television during trial, lack of counsel or injecting an improper charge into the proceedings. The law provides that if there is a probability of unfairness, there is a lack of due process and the trial is vitiated. Petitioner contends that the facts of his case sustain the burden of probability of unfairness and that his conviction for burglary should be reversed as well as the one for larceny.

II.

The Concurrent Sentence Doctrine Enunciated in Hirabayashi v. United States Is Invalid Today.

In *Hirabayashi* v. *United States,* 320 U.S. 81, 105, the Court held that if at least one of two convictions obtained in a single trial was valid, it would not consider the validity of the remaining conviction where the sentences were to be served concurrently. The second conviction was thus considered to be a mooted legal issue not requiring judicial review. The rationale supporting the concurrent sentence mootness doctrine is equally applicable to the situation presented where the defendant has completed service of his imprisonment. In this latter situation the Court has made an exception to the mootness doctrine where " . . . under either State or Federal law further penalties or disabilities can be imposed . . . as a result of the judgment which . . . has been satisfied." *St. Pierre* v. *United States,* 319 U.S. 41.

The *St. Pierre* decision implied that the defendant had the burden of establishing the existence of "collateral legal consequences" resulting from conviction. This burden was shifted in *Pollard* v. *United States,* 352 U.S. 354, where the Court presumed that collateral legal consequences existed as a result of a conviction that for one reason or another had become apparently moot when presented for review. The Court, at page 358, said:

> "The possibility of consequences collateral to the imposition of sentence is sufficiently substantial to justify our dealing with the merits."

Recently, this Court reviewed the "mootness" issue in *Sibron* v. *State of New York, supra.* Referring to its decision on mootness in *Pollard* v. *United States, supra, Fiswick* v. *United States,* 329 U.S. 211, and *United States* v. *Morgan,* 346 U.S. 502, the Court said:

> "The Court thus acknowledged the obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences. The mere 'possibility' that this will be the case is enough to preserve a criminal case from ending 'ignominiously in the limbo of mootness'." 88 S.Ct. 1899.

There is no cogent reason why the Court's philosophy on mootness should be less applicable to concurrent sentences than it is to sentences of imprisonment already served at the time of review. Myriad collateral legal consequences, many of them unpredictable, will affect the defendant in either case.

In the instant case there are probable collateral legal consequences that stem from the invalid larceny conviction. The most obvious and immediate consequence is the period of time petitioner will have to serve under his conviction. Article 41, § 127, of the Annotated Code of Maryland, in pertinent part, provides:

> "The State's attorney . . . is hereby required to make and transmit to the Board of Parole and Probation . . . a resume of the facts and evidence adduced *in each case* tried . . . so that the Board . . . may have an abstract of each case in which application for parole may be made under the provisions of this article." [Emphasis supplied.]

The Board of Parole and Probation considers the number of convictions rendered against an applicant as a factor in determining his eligibility for parole or probation. It is a fair assumption that if petitioner is serving a sentence for one, rather than two convictions, he is likely to be released earlier.

Another legal consequence may consist of the use which a future judge may make of the larceny conviction. In *Sibron* v. *State of New York, supra,* this Court said:

> "A judge or a jury faced with a question of character, like a sentencing judge, may be inclined to forgive or at least discount a limited number of minor transgressions, particularly if they occurred sometime in the relatively distant past.[2] It is impossible for this Court to say at what point the number of convictions on a man's record renders his reputation irredeemable."

Use of a felony conviction to impeach a defendant's character, commonly allowed in most jurisdictions, and ineligibility under municipal licensing laws, are just a few other collateral legal consequences of the unlawful conviction. It is further submitted that the conviction should be reversed under this Court's inherent power to simply correct a wrong.

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[2] Counsel is advised that the petitioner has one previous felony conviction which occurred in 1939.

Conclusion

Based upon the foregoing it is respectfully submitted that since irrelevant and incompetent evidence was used against the petitioner he did not have a fair trial and both convictions are invalid and should be reversed. It is further submitted that the concurrent sentence doctrine enunciated in *Hirabayashi* v. *United States* is invalid.

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OCTOBER TERM, 1968

No. 201

JOHN DALMER BENTON,
Petitioner,

v.

STATE OF MARYLAND,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

SUPPLEMENTARY BRIEF FOR THE RESPONDENT

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IN THE

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SUPPLEMENTARY BRIEF FOR THE RESPONDENT

BACKGROUND AND QUESTIONS PRESENTED

Certiorari was granted by the Court on June 17, 1968, on the following issues:

1. Is the double jeopardy clause of the Fifth Amendment applicable to the States through the Fourteenth Amendment?

2. If so, was the Petitioner "twice put in jeopardy" in this case?

The case was argued before the Court on December 12, 1968, and on December 16, 1968, the Court entered the following Order:

"This case is restored to the docket for reargument on March 24, 1969, limited to the following question, not specified in the original writ:

Does the 'concurrent sentence doctrine', enunciated in *Hirabayashi v. United States*, 320 U.S. 81, 105, and subsequent cases, have continuing validity in light of such decisions as *Ginsberg v. New York*, 390 U.S. 629, 633, n. 2, *Peyton v. Rowe*, 391 U.S. 54, *Carafas v. LaVallee*, 391 U.S. 234, 237-238, and *Sibron v. New York*, 392 U.S. 40, 50-58?

The Solicitor General of the United States is invited to file a brief and to participate in oral argument."

While the Supplementary Brief for the Petitioner contains two additional questions and arguments contrary to the Order of this Court, the Respondent will limit its Brief to the question propounded by the Order unless instructed otherwise by the Court.

ARGUMENT

THE CONCURRENT SENTENCE DOCTRINE, ENUNCIATED IN *HIRABAYASHI v. UNITED STATES*, 320 U.S. 81, 105, AND SUBSEQUENT CASES, DOES HAVE CONTINUING VALIDITY IN LIGHT OF SUCH DECISIONS AS *GINSBERG v. NEW YORK*, 390 U.S. 629, 633, n. 2, *PEYTON v. ROWE*, 391 U.S. 54, *CARAFAS v. LaVALLEE*, 391 U.S. 234, 237-238, AND *SIBRON v. NEW YORK*, 392 U.S. 40, 50-58.

The "concurrent sentence doctrine" enunciated in *Hirabayashi* can be traced from its origin in the common law of England through land mark decisions of this Court in the early days of our republic and the later 19th and early 20th Century to the present era.

Its progenitor was the ancient rule stated in the English case of *Regina v. Ingram*, 1 Salk. 384, (1712) and elaborated by Lord Mansfield in *Peake v. Oldham*, 1 Cowp. 275 (1775), that if there is one good count sufficient to sustain a conviction. the verdict will stand notwithstanding all the other counts are bad. The rule is based on the theory that

a court will only sentence on the valid count and disregard as surplusage any count which is invalid.

This rule was first enunciated in this Court by Chief Justice Marshall in *Locke v. United States*, 7 Cranch 339 (1812) in sustaining a libel action to condemn a confiscated cargo. The Court stated at Page 344:

> "The information consists of several counts, to all of which exceptions are taken. The court, however, is of opinion that the 4th count is good, and this renders it unnecessary to decide on the others."

In *Claasen v. United States*, 142 U.S. 140, 35 L. Ed. 966, 12 S. Ct. 169 (1891) the Court had occasion, when a general sentence on all counts was involved, to apply the rule. Justice Gray, speaking for the majority of the Court, stated at Page 146 of 142 U.S.:

> "This count and the verdict of guilty returned upon it being sufficient to support the judgment and sentence, the question of the sufficiency of the other counts need not be considered.
>
> "In criminal cases the general rule, as stated by Lord Mansfield before the Declaration of Independence is that if there is any one count to support the verdict, it shall stand good, notwithstanding all the rest are bad. *Peake v. Oldham*, Cowp. 275, 276; *Rex v. Benfield*, 2 Burr, 980, 985. See also *Grant v. Astle*, 2 Dougl. 722, 730. And it is settled law in this court, and in this country generally, that in any criminal case a general verdict and judgment on an indictment or information containing several counts cannot be reversed on error, if any one of the counts is good and warrants the judgment, because in absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only."

Later, the Court elucidated the rule that if the sentence did not exceed the maximum penalty which might have

been exacted under the good count standing alone, the invalid count did not warrant reversal. *Whitfield v. Ohio*, 297 U.S. 431, 80 L. Ed. 778, 56 S. Ct. 532 (1936); *Sinclair v. United States*, 279 U.S. 263, 73 L. Ed. 692, 49 S. Ct. 268 (1929); *Abrams v. United States*, 250 U.S. 616, 63 L. Ed. 1173, 40 S. Ct. 17 (1919); *Evans v. United States*, (2 cases) 153 U.S. 584, 595, 608, 38 L. Ed. 830, 834, 839, 14 S. Ct. 934, 939 (1894).

Pierce v. United States, 252 U.S. 239, 64 L. Ed. 542, 40 S. Ct. 205 (1919), however, was the beginning of what today is referred to as the "concurrent sentence doctrine". In that case citing *Claasen* as authority the Court refused to reverse a conviction on four counts because of the insufficiency of the first count, stating at Page 252 of 252 U.S.:

> "The conceded insufficiency of the first count of the indictment does not warrant a reversal, since the sentences imposed upon Pierce, Creo and Zeilman did not exceed that which lawfully might have been imposed under the second, third or sixth counts, so that the concurrent sentence under the first count adds nothing to their punishment. *Claasen v. United States*, 142 U.S. 140, 146, 35 L. Ed. 966, 968, 12 S. Ct. R. 169, and cases cited."

In footnote No. 1, Mr. Justice Douglas delivering the opinion of the Court in *Pinkerton v. United States*, 328 U.S. 640, 642, 90 L. Ed. 1489, 66 S. Ct. 1180 (1945), makes the point that the same rule applied in *Claasen* obtains in the case of concurrent sentences and cites *Hirabayashi*.

Pierce was followed by *Rae v. Brooks*, 267 U.S. 432 69 L. Ed. 699, 45 S. Ct. 345 (1924) where the Court found it unnecessary to pass on a question involving a second count on which the Petitioner received a sentence concurrent with the First Count because ". . . the conviction can be sustained on the first count . . . there is no ground for

reversing the case because of error in charging as to the second count." The Court reached the same results under substantially similar circumstances in *Gorin v. United States*, 312 U.S. 19, 85 L. Ed. 488, 61 S. Ct. 617 (1940).

The "concurrent sentence doctrine" was thus well-established when the Court rendered its opinion in *Hirabayashi* on June 21, 1943. There the Petitioner was indicted under an Act of Congress allowing, inter alia, an Executive Order to authorize military commanders to designate certain zones as military areas and to issue regulations governing these areas. Petitioner was indicted on two counts, (1) failure to report to a designated civilian central area for evacuation; and (2) failure to remain in his residence located in a designated military area between 8:00 P.M. and 6:00 A.M. He was found guilty on both counts and sentenced to three months on each count to run concurrently. After a lengthy discussion of the scope of the war clause, the lack of equal protection clause in the Fifth Amendment, and the legality of the delegation of legislative power to the Executive Branch the Court affirmed as to the Second Count.

As to the First Count Mr. Chief Justice Stone, speaking for the majority of the Court stated at Page 85 of 320 U.S.:

> "Since the sentences of three months each imposed by the District Court on the two counts were ordered to run concurrently, it will be unnecessary to consider questions raised with respect to the First Count if we find that the conviction on the Second Count for violation of the curfew order must be sustained."

The Circuit Courts of Appeals had occasion to apply the "doctrine" prior to 1943,[1], but it was after *Hirabayashi* that

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[1] *Haynes v. United States*, 101 F. 817 (C.A. 8, 1900); *Jarvis v. United States*, 90 F. 2d 243 (C.A. 1, 1937); *Giugm, et al. v. United States*, 127 F. 2d 786 (C.A. 1, 1942).

the Courts began to recognize the great usefulness of the "doctrine" and applied it with consistency.[2] It has also been utilized by State jurisdictions.[3]

This Court has reiterated the "doctrine" in *Flournoy v. Wiener*, 321 U.S. 253, 88 L. Ed. 708, 64 S. Ct. 548 (1943); *Pinkerton v. United States*, *supra*; *United States v. Sheridan*, 329 U.S. 379, 91 L. Ed. 359, 67 S. Ct. 332 (1946); *Rovicaro v. United States*, 353 U.S. 53, 1 L. Ed. 2d 639, 77 S. Ct. 623 (1957); *Lawn v. United States*, 355 U.S. 359, 2 L. Ed. 2d 321, 78 S. Ct. 311 (1958); *Greene v. United States*, 358 U.S. 326, 3 L. Ed. 2d 340, 79 S. Ct. 340 (1959); *United States v. Romano*, 382 U.S. 136, 15 L. Ed. 2d 210, 86 S. Ct. 279 (1965); *United States v. Gainey*, 380 U.S. 63, 13 L. Ed. 2d 658, 85 S. Ct. 754 (1965).

In *Lanza v. State*, 370 U.S. 139, 8 L. Ed. 2d 384, 82 S. Ct. 1218 (1962) the Court refused to reverse a conviction in which all sentences were made concurrent and only two counts out of 19 were found to be valid. As recently as

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[2] *O'Malley v. United States*, 227 F. 2d 332 (C.A. 1, 1955); *United States v. Gordon*, 379 F. 2d 790 (C.A. 2, 1967); *Barnes v. United States*, 381 F. 2d 265 (D.C. Cir. 1967); *Green v. United States*, 383 F. 2d 202 (D.C. Cir. 1967); *United States v. Butenko*, 384 F. 2d 565 (C.A. 3 1967); *United States v. Jacobs*, 386 F. 2d 172 (C.A. 4 1967); *United States v. Parsow*, 391 F. 2d 241 (C.A. 4 1968); *United States v. Harris*, 391 F. 2d 390 (C.A. 6 1968); *United States v. Wechsler*, 392 F. 2d 348 (C.A. 4 1968); *United States v. Hanna*, 393 F. 2d 703 (C.A. 5 1968); *Cribb v. United States*, 397 F. 2d 361 (C.A. 5 1968), Cert. denied Dec. 18, 1968. See generally, 11-7th Decennial Digest 695-710.

[3] *People v. Landis*, 66 Ill. App. 2d 458, 214 N.E. 2d 343 (1966); *State v. Teutsch*, 80 S.D. 462, 126 N.W. 2d 112 (1964); *Marks v. State*, 230 Md. 108, 185 A. 2d 909 (1962); *Commissioner v. Finkelstein*, 191 Pa. Super. 328, 156 A. 2d 888 (1959); *Craddock v. United States*, 153 A. 2d 699 (D.C. Mun. 1959); *Shorter v. State*, 234 Ind. 1, 122 N.E. 2d 847 (1954); *State v. Gipson*, 233 N.C. 691, 65 S.E. 2d 508 (1951); *Meade v. State*, 198 Md. 489, 84 A. 2d 892 (1951); *State v. Rogers*, 8 N.J. Super. 64, 73 A. 2d 274 (1950); *People v. Ponce*, 96 C.A. 2d 327, 215 P. 2d 75 (1950).

January 22, 1968, the members of the Court recognized the existence of the "doctrine" in *Epton v. New York*, 390 U.S. 29, 19 L. Ed. 2d 808, 88 S. Ct. 824 (1968) where in a concurring opinion denying certiorari Mr. Justice Stewart cited *Hirabayashi* as making it unnecessary to decide the validity of two of the three counts of which the Defendant had been convicted since one count was assumed valid. In a dissenting opinion in the same case Mr. Justice Douglas acknowledged the "doctrine" by denying its applicability to the facts of the case stating at page 34 of 390 U.S.:

> "Since in my opinion none of the petitioner's convictions is free of doubt . . . there is no basis for applying the rule that there is no occasion to review a conviction on one count of an indictment if the judgment on another count is valid and the sentences are concurrent."

On December 17, 1968, the Court denied certiorari where a Defendant sought review of a decision by the United States Court of Appeals Fifth Circuit which held that the Court was not required to pass on Defendant's attacks on his conviction as to three counts of a six count indictment since sentences received on the counts attacked were to run concurrently with those sentences imposed on counts as to which there was no question of guilt. *Cribb v. United States*, 37 L. W. 3219.

While the "concurrent sentence doctrine" has been an integral part of American Jurisprudence from prior to the founding of our country to the present as outlined in the preceding paragraphs, there has been very little illumination shed by the case law as to the reasons for its existence. The fact that the application of the "doctrine" has (1) conserved judicial time and effort, (2) has provided the Court with a convenient means of avoiding unnecessary questions, and (3) terminated fruitless litigation, cannot

be denied. However, the principle legal foundation of the "doctrine" would be lack of jurisdiction, to wit: once the initial determination of one valid count is made, the validity of the other count or counts become, in effect, moot questions. The lack of jurisdiction by this Court to review moot cases derives from the requirements of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case for controversy. *Liner v. Jafco, Inc.*, 375 U.S. 301, 11 L. Ed. 2d 347, 84 S. Ct. 391 (1964). Elaborating on this point, the Court in *Local 8-6 Oil Chemical & Atomic Workers International Union AFL-CIO, et al. v. Missouri*, 361 U.S. 363, 4 L. Ed. 2d 373, 80 S. Ct. 391 (1960), stated at Page 367 of U.S. 363:

> ". . . the duty of this Court is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules which cannot affect the matter in issue in the case before it" (Cases cited).

Therefore, it is urged by this Respondent that the "concurrent sentence doctrine" is applicable to the case at bar insofar as the Defendant's conviction for the crime of burglary under the first count is valid and whether or not his conviction under the third count is valid or invalid is a moot question and is not within the jurisdiction of the Court under Article III of the Constitution.

It is recognized by the Respondent that the "doctrine" is predicated on the inherent understanding that no injury be sustained by the Defendant by the Court's failure to rule on the invalid count. In *Ginsberg, Peyton, Carafas* and *Sibron* it is apparent that the Court has viewed in a new light what does or does not constitute "injury" to a Defendant as a result of a conviction. However, an examination of the facts of these cases, as well as the principles enun-

ciated therein indicates that they do not change the "concurrent sentence doctrine" per se.

The law as to when a criminal case is moot so as to preclude review of or attack on a conviction or sentence is now unsettled, with a noticeable tendency of this Court to relax rules against the review of judgment in criminal cases in certain circumstances. In the area of the doctrine that an accused who has satisfied his sentence either by serving a prison term or paying a fine renders his case moot so as to preclude review of or attack on his conviction or sentence, this Court has modified the traditional rule by permitting an accused who has satisfied his sentence to obtain review of or otherwise to challenge his conviction or sentence where he can show under either state or federal law further penalties or disabilities as a result of the judgment which has been satisfied. *St. Pierre v. United States,* 319 U.S. 41, 87 L. Ed. 1199, 63 S. Ct. 910 (1943).

This line of reasoning was followed in *Ginsberg v. New York, supra,* decided April 22, 1968, where the Defendant was indicted and convicted on two counts of selling "girlie" magazines to a minor in violation of the New York criminal obscenity statute. Although the Defendant could have been sentenced to one year imprisonment or a $500.00 fine or both, the Court suspended sentence on all counts. Under a New York statute the judge could thereafter recall Appellant and impose sentence only within one year. The judge did not do so, hence, the suspension was irrevocable. Mr. Justice Brennan, speaking for the majority of the Court, disposed of the question of mootness by way of a footnote (Footnote 2) at Page 633 of 390 U.S., stating:

> "2. The case is not moot. * * * Although *St. Pierre v. United States,* 319 U.S. 41, 87 L. Ed. 1199, 63 S. Ct. 910, held that a criminal case had become moot when the

petitioner finished serving his sentence before direct review in this Court, *St. Pierre* also recognized that the case would not have been moot had 'petitioner shown that under either state or federal law further penalties or disabilities can be imposed on him as result of the judgment which has now been satisfied.' Id, at 43, 87 L. Ed. at 1201. The State of New York concedes in its brief in this Court addressed to mootness 'that certain disabilities do flow from the conviction.' The brief states that among these is 'the possibility of ineligibility for licensing under state and municipal laws regulating various lawful occupations. . . .' Since the argument, the parties advised the Court that, although this is the first time appellant has been convicted of any crime, this conviction might result in the revocation of the license required by municipal law as a prerequisite to engaging in the luncheonette business she carries on in Bellmore, New York . . .'. In these circumstances the case is not moot since the conviction may entail collateral consequences sufficient to bring the case within the *St. Pierre* exception. See *Fiswick v. United States*, 329 U.S. 211, 220-222, 91 L. Ed. 196, 202, 203, 67 S. Ct. 224. We were not able to reach that conclusion in *Tannenbaum v. New York*, 388 U.S. 439, 18 L. Ed. 2d 1300, 87 S. Ct. 2107, or *Jacobs v. New York*, 388 U.S. 431, 18 L. Ed. 2d 1294, 87 S. Ct. 2098, in which the appeals were dismissed as moot. In *Tannenbaum* there was no contention that the convictions under the now repealed § 484-i entailed any collateral consequences. In *Jacobs* the appeal was dismissed on motion of the State which alleged, inter alia, that New York law did not impose 'any further penalty upon conviction of the misdemeanor here in issue.' Appellant did not there show, or contend, that his license might be revoked for 'conviction of any crime'; he asserted only that the conviction might be the basis of a suspension under a provision of the Administrative Code of the City of New York requiring the Department of Licenses to assure that motion picture theatres are not conducted in a manner offensive to 'public morals.'"

This decision is distinguishable from the "concurrent sentence doctrine" insofar as it concerns the "satisfaction of sentence doctrine" and the concession of the State of New York, to wit: (1) "that certain disabilities do follow from the conviction"; (2) among these is "the possibility of ineligibility for licensing under state and municipal laws regulating various lawful occupations . . ."; and (3) stipulation that this was the Defendant's first criminal conviction, therefore there was a greater possibility of revocation of license to operate the business under a pertinent local statute.

Shortly after *Ginsberg*, this Court had the opportunity, again, on direct review to consider the rule that satisfaction of sentence precludes review. In *Sibron v. New York*, *supra*, the accused was arrested under New York's "stop and frisk" law for possession of heroin; after reserving his right to appeal, the Defendant plead guilty after the trial court refused to suppress the evidence; he was sentenced to six months in prison; the New York Court of Appeals affirmed the conviction; and the Defendant had served his sentence before the appeal reached this Court. Noting that the case was distinguishable from *St. Pierre* in that *Sibron* "could not have brought his case to this Court for review before the expiration of his sentence" 319 U.S. at 43, Mr. Chief Justice Warren, speaking for the Court went on to expand on the principle enumerated in *St. Pierre* in concluding that the case was not moot. Recognizing that this was a jurisdictional problem the Court was of the opinion that the two exceptions to its "doctrine" of mootness as outlined in *St. Pierre* were applicable. First, a State may not effectively deny a convict access to the Courts until he has been released and then argue that his case has been moot by his failure to do what it alone prevented him from doing.

Then the Court went on to state at page 53 of 392 U.S.:

"The second exception recognized in *St. Pierre* permits adjudication of the merits of a criminal case where 'under either state or federal law further penalties or disabilities can be imposed . . . as a result of the judgment which has . . . been satisfied.' 319 U.S., at 43. Subsequent cases have expanded this exception to the point where it may realistically be said that inroads have been made upon the principle itself. *St. Pierre* implied that the burden was upon the convict to show the existence of collateral legal consequences. Three years later in *Fiswick v. United States*, 329 U.S. 211 (1946), however, the Court held that a criminal case had not become moot upon release of the prisoner, noting that the convict, an alien, might be subject to deportation for having committed a crime of 'moral turpitude.' — even though it had never been held (and the Court refused to hold) that the crime of which he was convicted fell into this category. The Court also pointed to the fact that if the petitioner should in the future decide he wanted to become an American citizen, he might have difficulty proving that he was of 'good moral character.' *Id.* at 222.

"* * * in *Pollard v. United States*, 352 U.S. 354 (1957), the Court abandoned all inquiry into the actual existence of specific collateral consequences and in effect presumed that they existed. With nothing more than citations to *Morgan* and *Fiswick*, and a statement that 'convictions may entail collateral legal disadvantages in the future,' *id.*, at 358, the Court concluded that 'The possibility of consequences collateral to the imposition of sentence is sufficiently substantial to justify our dealing with the merits.' *Ibid.* The Court thus acknowledged the obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences. The mere 'possibility' that this will be the case is enough to preserve a criminal case from ending 'ignominously in the limbo of mootness.' *Parker v. Ellis*, 362 U.S. 574, 577 (1960) (dissenting opinion)."

Holding that it had jurisdiction, the Court concluded at Page 57 of 392 U.S.:

> "*St. Pierre v. United States, supra,* must be read in light of later cases to mean that a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction. That certainly is not the case here. Sibron 'has a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him.' *Fiswick v. United States, supra,* at 222. The case is not moot."

While *Sibron* can be distinguished from the "concurrent sentence doctrine" on the facts and on the action of the State in effectively denying him access to the Courts until he had been released and then arguing that his case had been mooted by his failure to do what it alone prevented him from doing, the Court's holding "that a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction" does have a qualifying effect on the "doctrine".

On May 20, 1968, this Court handed down two decisions on another aspect of the mootness doctrine dealing with the term "in custody" as set forth in the Federal Habeas Corpus Statute. 28 U.S.C. (Sections 2241, 2242, 2243, 2244, 2245, 2249, 2252 and 2254).

In *Carafas v. LaVallee, supra,* the issue presented on the "mootness" point was whether the expiration of the Petitioner's sentence before his application was finally adjudicated and while it was awaiting appellate review, terminates federal jurisdiction with respect to the application. The Court held that in light of *Ginsberg's* ruling as to "collateral consequences" the case was not moot. In overruling *Parker v. Ellis,* 362 U.S. 574, 4 L. Ed. 2d 963, 80 S. Ct.

909 (1960), which held that releasing prisoners from jail moots Habeas Corpus proceedings because the only remedy is release, the Court stated at Page 238 of 391 U.S.:

> "It is clear that petitioner's cause is not moot. In consequence of his conviction, he cannot engage in certain businesses; he cannot serve as an official of a labor union for a specified period of time; he cannot vote in any election held in New York State; he cannot serve as a juror. Because of these 'disabilities or burdens [which] may flow from' petitioner's conviction, he has 'a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him.' *Fiswick v. United States*, 329 U.S. 211, 222 (1946). On account of these 'collateral consequences,' the case is not moot." (Cases cited.)

The factual circumstances of *Carafas*, insofar as it concerns the satisfaction of sentence doctrine and more important the critical issue of the expanded interpretation of "in custody" under 28 U.S.C. Section 2243, distinguishes it from *Hirabayashi*. However, the language of the Court, in arriving at the conclusion that "he has a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him" must be considered in the application of the "concurrent sentence doctrine."

Peyton v. Rowe, supra, decided on the same date, May 20, 1968, as *Carafas* concerns the scope of 28 U.S.C. Section 2241(c)(3) which specifies that the United States District Courts may issue writs of habeas corpus on behalf of prisoners who are "in custody in violation of the Constitution . . . of the United States." The question presented was whether a District Court could entertain a petition for a writ of habeas corpus from a prisoner incarcerated under consecutive sentences who claimed that a sentence that he was scheduled to serve in the future was invalid because of a deprivation of rights guaranteed by the Constitution.

In overruling *McNally v. Hill*, 203 U.S. 131, 79 L. Ed. 238, 55 S. Ct. 24 (1934), which held that the habeas corpus statute did not authorize attacks upon future consecutive sentences, the Court maintained "that the decision on that case was compelled neither by statute nor by history and that today it represents an indefensible barrier to prompt adjudication of constitutional claims in federal courts." Mr. Chief Justice Warren, speaking for the majority of the Court, stated at page 61 of 391 U.S.:

> "The substantial issue, however, which is posed by *Parker v. Ellis*, is not mootness in the technical or constitutional sense, but whether the statute defining the habeas corpus jurisdiction of the federal judiciary in respect of persons in state custody is available here.
>
> "The federal habeas corpus statute requires that the applicant must be 'in custody' when the application for habeas corpus is filed. This is required not only by the repeated references in the statute, but also by the history of the great writ. It province, shaped to guarantee the most fundamental of all rights, is to provide an effective and speedy instrument by which judicial inquiry may be had into the legality of the detention of a person. See *Peyton v. Rowe, ante.*
>
> "But the statute does not limit the relief that may be granted to discharge of the applicant from physical custody. Its mandate is broad with respect to the relief that may be granted. It provides that 'the court shall . . . dispose of the matter as law and justice require.' 28 U.S.C. § 2243. The 1966 amendments to the habeas corpus statute seem specifically to contemplate the possibility of relief other than immediate release from physical custody. At one point, the new § 2244 (b) speaks in terms of 'release from custody or other remedy.' See *Peyton v. Rowe, supra; Walker v. Wainwright*, 390 U.S. ..... (1963). Cf. *Ex parte Hull*, 312 U.S. 546 (1941).
>
> "But the harshness of a rule which may delay determination of federal claims for decades becomes ob-

vious when applied to the cases of Rowe and Thacker. Their cases also exemplify the manner in which the decision in *McNally* cuts against the prior and subsequent development of the writ in the federal courts.

". . . Yet, under the current schedules of confinement, it is argued, neither Rowe nor Thacker may obtain adjudication of his claims until after 1990. By that time, dimmed memories or the death of witnesses are bound to render it difficult or impossible to secure crucial testimony on disputed issues of fact. * * *

". . . Postponement of the adjudication of such issues for years can harm both the prisoner and the State and lessens the probability that final disposition of the case will do substantial justice. . . .

"Moreover, in arriving at its decision, the Court in *McNally* relied in part upon an unnecessarily narrow interpretation of the habeas corpus statute. Standing alone, the limitation of § 2241 (c) (3) — that '[t]he writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody in violation of the Constitution' — is not free of ambiguity. However, in common understanding 'custody' comprehends respondents' status for the entire duration of their imprisonment. Practically speaking, Rowe is in custody for 50 years, or for the aggregate of his 30- and 20-year sentences. For purposes of parole eligibility, under Virginia law he is incarcerated for 50 years. Va. Code Ann. § 53-251 (1967); see n. 3, *supra*. Nothing on the face of § 2241 militates against an interpretation which views Rowe and Thacker as being 'in custody' under the aggregate of the consecutive sentences imposed on them."

The main thrust of *Peyton* is the Court's elucidation on the nature of the Writ of Habeas Corpus and the expanded and more enlightening interpretation of the term "in custody" as set forth in 28 U.S.C., Section 2241 (c) (3). It is logical that postponement of the adjudication of the issues for years could harm not only the prisoner, but also the

State and lessens the probability that final disposition of the case will do substantial justice.

Our review of the historical background of the "concurrent sentence doctrine" and the line of cases which punctuate its existence prior to and subsequent to *Hirabayashi*, indicate that said doctrine has continuing validity. Like an ancient and venerable tree, it has withstood the ravages of time — not growing but surviving — protected by the jurisdictional clause of the United States Constitution through the "mootness doctrine" and the practical consideration of conserving judicial time and energy. But one would be foolhardy, indeed, if he were not to recognize that in the *Ginsberg, Peyton, Carafas* and *Sibron* line of cases a storm has arisen — within the friendly environments of the new approach to the mootness doctrine — of such proportion that it could sweep the "concurrent sentence doctrine" away or at the very least reduce it to a shadow of its former self. While the *Hirabayashi* line of cases were rooted in practical consideration such as conserving judicial time and energy plus lack of real injury to the Appellant, it is apparent from *Ginsberg, Peyton, Carafas* and *Sibron* that the approach in the future should be on a case to case basis using as a measuring rod whether or not the Appellant has or will suffer "collateral legal consequences". It is evident that the exception set forth in *St. Pierre* has now become the rule. Therefore, the "concurrent sentence doctrine" should continue to have validity but limited to cases where there is no collateral legal consequences to be imposed on the basis of the challenged conviction.

Applying this limited concept of the "concurrent sentence doctrine" to the facts of the case at bar, the issue is whether the Defendant will suffer any collateral legal consequences as a result of his second conviction. The Peti-

tioner was convicted of the crime of burglary, to wit: the breaking and entering of a dwelling house in the night time with intent to steal (Article 27, Section 30 of the Annotated Code of Maryland) and of the common law crime of larceny, to wit: feloniously taking and carrying away the personal property of another with the intent to deprive the owner of the property permanently. *Fletcher v. State*, 231 Md. 191, 189 A 2d 641 (1963). Both convictions grew out of the same identical facts. While larceny is not technically a lesser included offense in the crime of burglary, for practical purposes under the circumstances of the case at bar, the evidence produced at the trial to prove the burglary proved the larceny. The Petitioner received a sentence of 15 years on the burglary count and 5 years concurrent sentence on the larceny count.

In Petitioner's Supplementary Brief at p. 8 he states that the most obvious and immediate consequence from the larceny conviction would be the length of time Petitioner would be required to serve under his conviction. Other than to quote Article 41, Section 125, Annotated Code of Maryland (1968 Cumulative Supplement) (which requires reports by the State's Attorney to the Department of Parole and Probation and the Department of Correction of the resume of facts and evidence as to each case) and to make the bald statement "It is a fair assumption that if Petitioner is serving a sentence for one rather than two convictions, he is likely to be released earlier", the Petitioner offers no supporting data or argument for his statement. Said statement under the circumstances would be mere speculation. It could be argued contrary to the Petitioner's position that the report required under Article 41, Section 125 would help rather than harm because it would undoubtedly indicate that his larceny and burglary conviction grew out of the same identical circumstances. Hence, for parole pur-

poses they could be considered to merge. When considering the criteria for parole as outlined by Article 41, Section 111, Annotated Code of Maryland (1968 Cumulative Supplement)[4] plus the policy of the Parole Board, Article 41 Section 122(a) (1968 Cumulative Supplement),[5] to consider a convict for parole after he has served one-fourth of his substantive sentence it should be obvious that Petitioner's fears are unfounded. Even the mathematics of the situation militates against the Petitioner's position. On his fifteen year sentence he would not be considered for parole until he had served one-fourth of his term or three years 9 months less good time. Under his five year sentence if it were not concurrent he would be eligible for parole after one year three months less good time. While it is true his burglary conviction increases, the time the Defendant will serve on his concurrent larceny conviction,

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[4] Article 41, Section 111. Duties of Board (Parole) provides in pertinent part:

"It shall be the duty of the Board in carrying out its powers authorized herein:

(1) In determining whether a prisoner is suitable for release on parole:

(I) To consider the circumstances surrounding the crime, and the physical, mental and moral qualifications of persons who become eligible for parole;

(II) To determine whether there is reasonable probability that the prisoner, if released on parole, will remain at liberty without violating the laws, and whether the release of the prisoner on parole is compatible with the welfare of society; * * *."

[5] Article 41, Section 122(a), entitled investigation to determine advisability of parole provides:

"(a) It shall be the duty of the Board of its own initiative to request the Department to make such investigation as may enable the Board to determine the advisability of granting parole to persons sentenced under the laws of this State, to the jurisdiction of the Department of Correction, or to any other place of confinement or detention of violators of the criminal laws of the State whenever such prisoner shall have served in confinement one fourth of such term or consecutive terms."

the reverse is not true, because it can be argued that the Defendant would be serving three times the length of his imprisonment normally required for parole on the larceny conviction if it were not concurrent.

The advice that counsel for the Petitioner received in reference to the Petitioner's criminal record, see Footnote 2 on Page 9 of his Supplementary Brief, is not only erroneous but extremely misleading. While the line is tenuous in Maryland, as in other jurisdictions, in determining the seriousness of a crime by classification as to misdemeanors, penitentiary misdemeanors and felonies, a cursory reading of Petitioner's criminal Record[6] would indicate that he has been convicted of three felonies, the most recent of which was affirmed by the Court of Appeals of Maryland on April 12, 1962. *Benton v. Maryland*, 228 Md. 309, 179 A. 2d 718. In addition, he has been convicted of four other crimes and is presently under indictment and awaiting trial in the United States District Court for the District of Maryland on a felony charge, to wit: uttering counterfeit securities, 18 U.S.C. 472. The Petitioner expresses the fear that his larceny conviction might be used by some future Judge to impeach his character. Keeping in mind that

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[6] The following is a resumé of Mr. Benton's convictions compiled from his Federal Bureau of Investigation record No. 1473 189, Metropolitan Police Department, Washington, D.C., and transcript of his present and previous cases:

Date	*Charge*		*Disposition*
4-1-38	Grand Larceny	Wash., D.C.	3-6 months
10-21-40	Robbery	"	6-18 months
8-19-41	Violation Parole	"	Parole Revoked
1-13-50	Contempt	"	$20.00 or 10 days
4-5-56	Petty Larceny	"	$50.00 or 30 days
3-6-58	Petty Larceny	"	$100.00 or 30 days
3-15-61	Grand Larceny	Maryland	5 years
2-21-64	Rogue & Vagabond	"	$100/c

if some Court in the future was to review his criminal record, it would also include his present burglary conviction (assuming that it is affirmed by this Court), it is sheer speculation that a fifth felony conviction would have any possible collateral legal consequences that four felony convictions plus his other convictions do not have.

It would also follow that it would be sheer speculation that this larceny conviction considered in conjunction with his four other felony convictions plus his other convictions, would have any independent "collateral legal consequences" as to (1) impeaching Petitioner's credibility should he choose to put it in issue at any future criminal trial. Article 35, Section 10, Annotated Code of Maryland; (2) affecting the judgment of a Court in sentencing should Petitioner again be convicted of a crime; (3) making him ineligible under municipal, State licensing laws;[7] (4) depriving him of the right to vote. Article I, Section 2 of the Maryland Constitution; (5) depriving him of the right to serve as a juror. Article 51, Annotated Code of Maryland.

Therefore, having negated the possibility of "collateral legal consequences" as a result of the larceny conviction, the "concurrent sentence doctrine" should be applied to the case at bar.

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[7] To secure the following licenses or to engage in the following professions a person must be of "good moral character, etc.".

Doctor	—Art. 43, Sec. 124, Anno. Code of Md.
Dentist	—Art. 33, Sec. 28, Anno. Code of Md.
Druggist	—Art. 43, Sec. 261, Anno. Code of Md.
Funeral Director or Embalmer	—Art. 43, Sec. 345, Anno. Code of Md.
Psychologist	—Art. 43, Sec. 629, Anno. Code of Md.
Detective Agency	—Art. 56, Sec. 78, Anno. Code of Md.
Real Estate Broker	—Art. 56, Sec. 220, Anno. Code of Md.
Home Improvement Business	—Art. 56, Sec. 258, Anno. Code of Md.

CONCLUSION

For the foregoing reasons the Respondent submits that the "concurrent sentence doctrine" enunciated in *Hirabayashi v. United States*, and subsequent cases does have continuing validity in light of the decisions in *Ginsberg, Peyton, Carafas* and *Sibron*.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 201

JOHN DALMER BENTON, PETITIONER

v.

STATE OF MARYLAND

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF THE STATE OF MARYLAND

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States on the following question:

> Does the "concurrent sentence doctrine," enunciated in *Hirabayashi* v. *United States,* 320 U.S. 81, 105, and subsequent cases, have continuing validity in light of such decisions as *Ginsberg* v. *New York,* 390 U.S. 629, 633, n. 2; *Peyton* v. *Rowe,* 391 U.S. 54; *Carafas* v. *LaVallee,* 391 U.S. 234, 237–238; and *Sibron* v. *New York,* 392 U.S. 40, 50–58?

Addressing ourselves to that issue, we elaborate our

view that the concurrent sentence doctrine has continuing validity.[1]

We show, first, that the concurrent sentence doctrine is firmly established in federal courts, including this Court, as a principle of judicial efficiency which permits a reviewing court to avoid decision of questions which can have no practical effect on the outcome of a case before it, and that therefore the doctrine has not been applied where collateral legal consequences are found, or there is reason to believe the verdict or sentence on the good counts might have been affected. We next show that such consequences rarely result from concurrent sentences on unreviewed counts; in general, any consequences spring from the fact of conviction and not the number of counts on which conviction is had. Under the concurrent sentence doctrine, unlike the mootness doctrine generally, review is never denied to the conviction as a whole, or to arguments that an error reaches all counts. Thus, we contend that, as in cases of harmless error generally, the appellant should bear the burden of showing how a claimed legal error, infecting less than all counts on which he has been convicted, will, if uncorrected, add to the legal consequences he will suffer from the conviction as a whole. Finally, we show the importance of the doc-

[1] In this discussion, we make no special reference to the particular facts or disposition appropriate in this case. However, it follows from our view that the doctrine is only one of judicial convenience and sound administration that the doctrine is not a bar to this Court's consideration of both counts involved in this case, should it find reason to reach both.

trine, as it is now applied, to the efficient operation of the already overloaded courts of appeal.

Accordingly, we conclude that the test announced in *Sibron* v. *New York,* 392 U.S. 40, 57—that collateral consequences are to be presumed in the absence of proof to the contrary—is inappropriate as applied to the concurrent sentence doctrine, and that while courts of appeals and this Court may consider all claims of error in particular cases, they should be required to do so only if a collateral legal consequence is shown.

A. THE HISTORY AND PRESENT APPLICATION OF THE CONCURRENT SENTENCE DOCTRINE REVEAL IT AS A PRINCIPLE OF JUDICIAL EFFICIENCY WHICH PERMITS JUDGES TO AVOID DECISION OF ISSUES WHICH HAVE NO IMPACT ON THE RIGHTS OF ANY PARTY

The challenged practice of partial review of multiple count convictions first appeared in this Court in cases where the accused was charged on several counts, but given only a single, general sentence. Thus, Chief Justice Marshall wrote for this Court in 1813, in a forfeiture case charging violation of the customs laws, that a finding that one count is good "renders it unnecessary to decide on the others." *Locke* v. *United States,* 7 Cranch 339, 344; see, also, *Clifton* v. *United States,* 4 How. 242, 250; *Snyder* v. *United States,* 112 U.S. 216, 217. In *Claassen* v. *United States,* 142 U.S. 140, a criminal case in which a general sentence had been imposed after the defendant was convicted of five counts of embezzlement, the Court upheld one count and continued—

> This count and the verdict of guilty returned upon it being sufficient to support the judgment

> and sentence; the question of the sufficiency of the other counts need not be considered.
>
> In criminal cases, the general rule, as stated by Lord Mansfield before the Declaration of Independence, is "that if there is any one count to support the verdict, it shall stand good, notwithstanding all the rest are bad." *Peake* v. *Oldham*, Cowper, 275, 276; *Rex* v. *Benfield*, 2 Bur. 980, 985. See also *Grant* v. *Astle*, 2 Doug. 722, 730. And it is settled law in this court, and in this country generally, that in any criminal case a general verdict and judgment on an indictment or information containing several counts cannot be reversed on error, if any one of the counts is good and warrants the judgment, because, in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only. [At 146–147]

The rule thus recognized has been consistently reaffirmed by this Court.[2]

Where a defendant convicted on several counts has received separate, concurrent sentences, rather than a single, general sentence within the maximum imposable for a single count, there is even more reason for limiting review to one of the counts. With respect to a

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[2] *United States* v. *Gainey*, 380 U.S. 63, 65 (the "concurrent sentences" alluded to were actually a single general sentence, see Transcript of Record, pp. 48–50, No. 13, October Term, 1964); *Barenblatt* v. *United States*, 360 U.S. 109, 115; *Sacher* v. *United States*, 356 U.S. 576, 579; *Emspak* v. *United States*, 349 U.S. 190, 195, n. 9; *Pinkerton* v. *United States*, 328 U.S. 640, 641–642, n. 1; *Whitfield* v. *Ohio*, 297 U.S. 431, 438; *Sinclair* v. *United States*, 279 U.S. 263, 299; *Abrams* v. *United States*, 250 U.S. 616, 619; *Goode* v. *United States*, 159 U.S. 663, 669; *Evans* v. *United States*, 153 U.S. 608, 609; *Evans* v. *United States*, 153 U.S. 584, 595.

general sentence the rule presumes that the trial court would have imposed the same sentence if the good count had stood alone. Where individual sentences are imposed to run concurrently for each count upon which a verdict of guilty was returned, there is no need to rely upon a presumption, for the trial court has indicated the penalty deemed appropriate for each count separately. This difference has led at least one state jurisdiction to recognize the possibility of limited review where concurrent sentences are imposed, although it rejects the *Claassen* presumption and requires review on all counts underlying a general sentence. See *State* v. *Kaufman,* 18 N.J. 75, 81, 112 A. 2d 721, 725. This Court has consistently been willing to limit its review to a single count sufficient to support the sentence where separate, concurrent sentences have been adjudged.[3] The doctrine has also

[3] *United States* v. *Romano*, 382 U.S. 136, 138; *Yellin* v. *United States*, 374 U.S. 109, 148 (dissenting opinion); *Lanza* v. *New York*, 370 U.S. 139, 151–152, n. 1 (concurring opinion); *Braden* v. *United States*, 365 U.S. 431, 433 n. 2, 450–451 n. 3 (dissenting opinion); *Greene* v. *United States*, 358 U.S. 326, 330; *Lawn* v. *United States*, 355 U.S. 339, 359; *Roviaro* v. *United States*, 353 U.S. 53, 59 n. 6; *United States* v. *Sheridan*, 329 U.S. 379, 381; *Pinkerton* v. *United States*, 328 U.S. 640, 642 n. 1; *Hirabayashi* v. *United States*, 320 U.S. 81, 85, 105; *United States* v. *Johnson*, 319 U.S. 503, 518; *Edwards* v. *United States*, 312 U.S. 473, 479, 483; *Gorin* v. *United States*, 312 U.S. 19, 32; *United States* v. *Trenton Potteries*, 273 U.S. 392, 402; *Brooks* v. *United States*, 267 U.S. 432, 441; *Pierce* v. *United States*, 252 U.S. 239, 252–253; *Debs* v. *United States*, 249 U.S. 211, 216.

received frequent application in all eleven federal circuits.[4]

The doctrine has not usually been considered mandatory, nor has it been applied in all cases. Although federal courts, including this Court, have sometimes stated that a conviction "must" be affirmed where there is a valid count carrying a concurrent sentence,[5] they have also stated that such convictions "may" be affirmed, or otherwise indicated that the doctrine is not obligatory.[6] The overwhelming majority of the

[4] Representative of recent courts of appeals decisions involving the doctrine are the following: *Saville* v. *United States*, 400 F. 2d 397, 399, 400 (C.A. 1), certiorari pending, No. 1045 Misc. this Term; *United States* v. *Goldberg*, 401 F. 2d 644, 647 (C.A. 2), certiorari denied, February 24, 1969, No. 1027 Misc., this Term; *United States* v. *Butenko*, 384 F. 2d 554, 565 (C.A. 3), certiorari granted, 392 U.S. 923, No. 197, this Term; *United States* v. *Wechsler*, 392 F. 2d 344, 348 (C.A. 4), certiorari denied, 392 U.S. 932; *Smith* v. *United States*, 403 F. 2d 689, 691, n. 4 (C.A. 5); *United States* v. *Lothridge*, 402 F. 2d 454 (C.A. 6), certiorari denied, 393 U.S. 843; *United States* v. *Izzi*, 385 F. 2d 412, 413 (C.A. 7); *Jacobs* v. *United States*, 395 F. 2d 469, 473 (C.A. 8); *Pasterchik* v. *United States*, 400 F. 2d 696, 702 (C.A. 9); *Galbraith* v. *United States*, 387 F. 2d 617, 619 (C.A. 10), but see *Sciberras* v. *United States*, 404 F. 2d 247 (C.A. 10); *Baker* v. *United States*, 401 F. 2d 958, 986 (C.A. D.C.).

[5] *United States* v. *Gainey*, 380 U.S. 63, 65; *Yellin* v. *United States*, 374 U.S. 109, 148 (dissenting opinion); *Davis* v. *United States*, 385 F. 2d 919, 921 (C.A. 5); *United States* v. *Thomas*, 303 F. 2d 561, 562 (C.A. 6); *White* v. *United States*, 330 F. 2d 811, 812 (C.A. 8), certiorari denied, 379 U.S. 885; *Garcia* v. *United States*, 373 F. 2d 806, 807 (C.A. 10); *Fabianich* v. *United States*, 302 F. 2d 904 (C.A.D.C.), certiorari denied, 371 U.S. 816; see *Braden* v. *United States*, 365 U.S. 431, 450–451 n. 3 (dissenting opinion).

[6] *Roviaro* v. *United States*, 353 U.S. 53, 59 n. 6; *Greene* v. *United States*, 358 U.S. 326, 330; *United States* v. *Cottage*, 354 F. 2d 975, 976–977 (C.A. 6), certiorari denied, 383 U.S. 969; *Galbraith* v. *United States*, 387 F. 2d 617, 619 (C.A. 10); *Aron* v. *United States*, 382 F. 2d 965, 972 n. 2 (C.A. 8); *Smith* v. *United States*, 335 F. 2d 270, 272 n. 2 (C.A.D.C.).

cases simply state, in effect, that it is "unnecessary" to reach alleged errors relating to less than all counts carrying concurrent sentences. E.g., *Hirabayashi* v. *United States*, 320 U.S. 81, 105. Moreover, the courts of appeals have indicated that they will review all counts, and reverse when necessary, where it appears that the alleged error might also have affected the verdict on the good counts (*United States* v. *Barash*, 365 F. 2d 395, 399, 403 (C.A. 2); *Smith* v. *United States*, 335 F. 2d 270, 271–272 (C.A.D.C.); see *Saville* v. *United States*, 400 F. 2d 397, 399, 400 (C.A. 1) (majority and concurring opinions); *Chavez* v. *United States*, 387 F. 2d 937; 939 (C.A. 9); *United States* v. *Mont*, 306 F. 2d 412, 414 (C.A. 2), certiorari denied, 371 U.S. 935; *United States* v. *Guido*, 200 F. 2d 105, 106 (C.A. 2)), or where there is reason to doubt that the sentence on the valid counts would otherwise have been the same (*United States* v. *Hines*, 256 F. 2d 561 (C.A. 2); *Robinson* v. *United States*, 30 F. 2d 25, 29 (C.A. 6); see *Saville* v. *United States*, *supra*, 400 F. 2d at 399; *United States* v. *Bottone*, 365 F. 2d 389, 394 (C.A. 2), certiorari denied, 385 U.S. 974), or where collateral penalties will be occasioned as a result of the conviction on the bad count (see *United States* v. *Hines*, *supra*; *Clark* v. *United States*, 267 F. 2d 99, 101–102, (C.A. 4)).

This Court has taken a similar view. Thus in *United States* v. *Trenton Potteries*, 273 U.S. 392, at 402, it was observed that nothing in the record suggested that the verdict on the good count was influenced by evidence on the other count; "[i]n these

circumstances" the judgment was sustained. In a few other cases, this Court reached all counts although concurrent or general sentences were imposed; it reversed on the bad counts, and remanded the case for resentencing where it appeared appropriate under the circumstances. *Yates* v. *United States*, 355 U.S. 66, 75-76 (concurrent sentences); *Nilva* v. *United States*, 352 U.S. 385, 396 (general sentence); *Ballew* v. *United States*, 160 U.S. 187, 197–203 (general sentence).[1]

B. SINCE FAILURE TO REVIEW ALL OF SEVERAL CONCURRENT SENTENCES ONLY RARELY WOULD CONDONE COLLATERAL LEGAL CONSEQUENCES, THE BURDEN MAY FAIRLY BE PLACED ON AN APPELLANT TO SHOW THAT THE CONCURRENT SENTENCE DOCTRINE SHOULD NOT BE APPLIED TO HIS APPEAL

1. IN THE ORDINARY CASE, INDIVIDUAL COUNTS ON WHICH CONCURRENT SENTENCES ARE IMPOSED CARRY NO INDIVIDUAL LEGAL CONSEQUENCES WHICH MIGHT REQUIRE THE VALIDITY OF CONVICTION ON EACH COUNT TO BE TESTED

In *Sibron* v. *New York*, 392 U.S. 40, 50–58; *Carafas* v. *LaVallee*, 391 U.S. 234, 237–238; *Peyton* v. *Rowe*, 391 U.S. 54; and *Ginsberg* v. *New York*, 390 U.S. 629, 633–634 n. 2, this Court recognized the existence of several secondary penalties or disabilities which, under state and federal laws, could be imposed upon a defendant as collateral consequences of a criminal conviction, and which thereby prevented the dismissal of such cases as moot or premature. Among the collat-

[1] In *Putnam* v. *United States*, 162 U.S. 687, 714–715 (concurrent sentences), this Court reviewed both counts, affirmed both judgment and sentence as to one and remanded for further proceedings on the other.

eral consequences thus recognized are the inability to engage in certain businesses or occupations, preclusion from holding public office, disenfranchisement, ineligibility for jury service, subjection to possible deportation in the case of certain aliens, statutorily authorized impeachment of character at a future trial,[8] and the amalgamation of consecutive sentences for parole and other custodial purposes. *Sibron* v. *New York, supra,* 392 U.S. at 53–56; *Carafas* v. *LaVallee, supra,* 391 U.S. at 237–238; *Peyton* v. *Rowe, supra,* 391 U.S. at 64 and n. 3; *Ginsberg* v. *New York, supra,* 390 U.S. at 633–634 n. 2; *Jacobs* v. *United States,* 388 U.S. 431, 435, 438 (dissenting opinions); *United States* v. *Morgan,* 346 U.S. 502, 513; *Fiswick* v. *United States,* 329 U.S. 211, 221–222; see generally Note, *Civil Disabilities of Felons,* 53 Va. L. Rev. 403 (1967). These are significant reasons for precluding the automatic loss of a right to appeal the propriety of criminal conviction.

Such consequences do not, however, normally flow from the failure to review (and possibly reverse) less than all of a series of related convictions on which concurrent sentences have been imposed. The concurrent sentence doctrine cannot be used to fore-

[8] In *Sibron* it was emphasized that there was a clear distinction between a general impairment of credibility, which was found not to constitute a legal disability in *St. Pierre* v. *United States,* 319 U.S. 41, 43, and a "specific statutory authorization for use of the conviction to impeach the 'character' of a defendant in a criminal proceeding." Such a statutory authorization in the petitioner's home state (N.Y. Code Crim. Proc. § 393–c) was found to constitute a "clear legal disability deliberately and specifically imposed by the legislature." 392 U.S. at 56 n. 17.

close review of a question common to all counts of a challenged conviction. Nor is it applied to foreclose direct review of a conviction resulting from one trial because of a concurrent sentence imposed in another. Thus, unlike mootness cases generally, the doctrine never serves to foreclose direct appeal from a conviction.[9] Since collateral disabilities generally flow from the fact of trial and conviction, rather than any one count or the number of counts on which conviction is had, failure to review a particular count is unlikely to entail a prejudice to the accused which would otherwise be corrected. And the exceptional cases are already well-recognized as occasions when the concurrent sentence doctrine should not be applied.

Thus, impeachment is not usually facilitated by the existence of a multiple count conviction. The concurrent sentence doctrine may frequently be applied, for example, in cases of mail fraud or counterfeiting, where each mailing or utterance is a separate

[9] For this reason, there is also less basis for concern that policies favoring prompt resolution of challenges to convictions will be frustrated. In the mootness and habeas corpus cases, this Court has been concerned at the real possibility that a present denial of relief may serve only to postpone the appellate challenge to a later date, when evidence on both sides of the issues will be stale. *E.g.*, *Sibron* v. *New York*, *supra*, 392 U.S. at 56–57; *Peyton* v. *Rowe*, *supra*, 391 U.S. at 64. This possibility is far more remote in the concurrent sentencing doctrine context. The initial affirmance on appeal will have meant that any challenges common to all counts have been found lacking in merit, and in addition that one of the several counts has been found independently valid. Any subsequent petition for collateral relief would have to establish error in these appellate conclusions before the question of error in the unreviewed counts would become relevant.

offense but the gist of the crime is the fraudulent scheme or counterfeiting activity. The impeachment "value" of conviction for such crimes lies in the fact of previous conviction, not in the number of counts that were then charged. Accordingly, a defendant previously convicted of mail fraud would be asked whether he is the person who was convicted of using the mails to defraud, not whether his conviction was in five or twenty-five counts.[10] In *Sibron,* 392 U.S. at 56, this Court pointed out that a material factor augmenting the potential impeaching effect of that conviction, as opposed to past convictions, was the recency of its occurrence; this factor has no relevance to the effect of concurrent sentences imposed at one time.

Similarly, concurrent sentences on several counts ordinarily make possible no greater enhancement of sentence on future conviction under federal or state recidivist statutes than an identical sentence on a single count. An allegedly moot sentence, fully served, may subject the offender to an increased penalty should he again commit an offense; counts left unreviewed because of the concurrent sentence doctrine have no such independent effect. Most recidivist statutes turn on the fact that after sentencing, for one or many crimes, a defendant then commits another offense. See Note, *Court Treatment of General*

[10] Conceivably, a prosecutor might try to show that a defendant was convicted at one trial of two separate, related crimes, such as separate bank robberies, only one of which was reviewed. For such a remote eventuality, it is more appropriate to hold that only the reviewed count can be the basis of impeachment than to do away with the concurrent sentence rule.

Recidivist Statutes, 48 Col. L. Rev. 238, 240, 242, 244 (1948); Comment, 6 Univ. of Fla. L. Rev. 560, 561 (1953); 5 Wharton, *Criminal Law and Procedure,* § 2220 at 440 (12th ed. 1957). Under the federal narcotics statutes, for example, 26 U.S.C. 7237, an offense is not considered subsequent for purposes of the statute unless it follows the conviction for the preceding offense. *E.g., Gonzalez* v. *United States,* 224 F. 2d 431 (C.A. 1), certiorari denied, 356 U.S. 913. This fully accords with the policy of the statutes to mete out more severe penalties to persons who have not been dissuaded from criminal activity by previous legal encounters. Convictions which do not affect the number of times a person is imprisoned would not subject a defendant to the hazard of an increased penalty for a subsequent offense.

Petitioner suggests that the number of counts upon which a defendant receives concurrent sentences is a factor in determining parole eligibility, and that application of the concurrent sentence doctrine would leave this collateral legal consequence untested (Pet. Supp. Br., pp. 8–9). But there is no such legal effect under federal law or practice.[11] A federal prisoner serving a specified term or terms "may be released on parole after serving one-third of such term or terms".

[11] Whether such a legal consequence exists under Maryland law is a matter outside our interest in this case. We note, however, that the statute petitioner cites, Md. Code Art. 41, § 127, calls for an abstract of each "*case* tried" in which guilt is found; there is nothing to show that this does not equally include abstracts of particular counts on which an applicant for parole may have been found not guilty. Moreover, the standards the Maryland Board is directed to apply in determining release, as in the federal system, emphasize readiness for release, and make

18 U.S.C. 4202; 28 C.F.R. 2.3. While consecutive sentences are aggregated in assessing the total term being served, concurrent sentences of course are not, and hence the number of concurrent sentences imposed has no bearing on the date a prisoner will become eligible for parole under the statute. *Clark* v. *United States*, 267 F. 2d 99, 102 (C.A. 4); see *Brown* v. *United States*, 256 F. 2d 151, 152 (C.A. 5). Nor is the decision of the Board of Parole as to whether an eligible prisoner should be released dependent upon the number of counts affirmed on appeal. Under 18 U.S.C. 4203, if it appears to the Board "that there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society, the Board may in its discretion authorize the release of such prisoner on parole". See also 28 C.F.R. 2.2.

There is no basis for supposing that the concurrent senfence rule has any practical effect upon the Board's consideration of release authorizations. The Board is required to consider "all available relevant and pertinent information concerning the case" (28 C.F.R. 2.14), not just conduct of the prisoner culminating in affirmed criminal convictions. This information in-

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no mention of the number of counts being served. *Id.* at Art. 41, §§ 112, 124. State boards of parole generally are advised and authorized to consider all circumstances connected with the offense for which the defendant is imprisoned, as well as all the facts concerning prior criminal charges whether or not convictions resulted. See generally, Advisory Council on Parole of the National Council on Crime and Delinquency, *Guides for Parole Selection*, Chap. III (1963).

cludes the presentence report, which contains a history of the prisoner's previous involvements with state and federal law enforcement agencies whether or not such matters resulted in criminal trials or convictions. 28 C.F.R. 2.14, 2.17; United States Probation Officer's Manual, §§ 6.15B; 6.22–6.24, 7.21 (1961). Background information concerning the immediate case is obtained from various sources, including the government attorney who handled the prosecution. Richardson, *Parole and the Law,* 2 National Probation and Parole Association Journal 27, 30 (1956); 28 C.F.R. 2.14. All aggravating and mitigating circumstances surrounding the acts leading to the prisoner's conviction are considered. *Richardson, supra;* Chappell, *The Lawyer's Role in the Administration of Probation and Parole,* 48 A.B.A. Jour. 742, 745 (1962);[12] Parole Evaluation Summary, United States Board of Parole Form H–1, p. 2 (1968); Administrative Office of the U.S. Courts, *The Presentence Investigative Report,* pp. 9–12, 30–32 (1965).

An indication of the inclination of parole boards to look behind the ultimate legal disposition of a criminal case appears in one widely-disseminated book of guidelines which notes: "the record of an arrest for felonious assault which was nol-prossed can be quite misleading; a violent offense may have been committed and for various reasons trial was not feasible, or else the charge may have been false. The facts are important in considering parolability." Advisory Council on Parole of the National Council on Crime

[12] Both Mr. Richardson and Mr. Chappell, at the time of writing the respective articles, held the office of Chairman of the United States Board of Parole.

and Delinquency, *Guides for Parole Selection,* 39–40 (1963). Thus, the entire panorama underlying the charges, not just the limited evidence in support of the convictions, is before the Board in making its evaluation of the prisoner's character. Since it is the whole man the Board members are evaluating, and since they must consider all relevant and pertinent information whatever the extent of its ultimate judicial confirmation, an appellate reversal on one or more related counts could have no real impact on their assessment of the prisoner's readiness for release.

Finally, in the usual case, there is no proper basis for concern that trial of the unreviewed counts together with the reviewed count may have affected the conviction and/or sentence imposed on the latter. Where a trial error is so grave as to infect all counts on which conviction is had, counsel will doubtless urge that the error is applicable to all counts and obtain review of the whole case in that respect. In such instances, invocation of the concurrent sentence doctrine is of course inappropriate. So, also, there are special circumstances which suggest independent review of all counts, despite concurrent sentences, because reversal on one or more of the charges will justify a remand for resentencing in light of doubts whether a lesser sentence might have been imposed if the surviving count or counts had stood alone. But such rare exceptions do not invalidate the concurrent sentence rule for most cases.[13]

[13] Under F.R. Crim. P. 8(a), joinder of offenses for trial is possible only if the offenses charged "are of the same or similar character or are based on the same act or transaction or on

There is normally no reason to believe the sentence imposed on any particular count was affected by a vulnerable conviction on another count. Sentences are imposed in light of "any prior criminal record of the defendant and * * * information about his characteristics, his financial condition and the circumstances affecting his behavior * * *," Fed. R. Crim. P. 32(c)(2). Since the trial judge is thus authorized to consider an accused's contemporaneous conduct without regard to whether it resulted in concurrent charges or convictions, the reversal of individual counts will not usually influence his sentencing choice. Indeed, when a judge imposes a general sentence or concurrent sentences rather than consecutive sentences, he in effect is indicating that he has made such a determination. At all events, in the case of concurrent sentences, the trial judge must be taken to be ruling that the penalty imposed is appropriate as to each

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two or more acts or transactions connected together or constituting parts of a common scheme or plan." Where several charges are brought on account of one transaction, for example, under the coordinate statutes governing narcotics offenses, or on account of one scheme, as in mail fraud prosecutions, the chance of prejudice to conviction or sentence on good counts by bad is particularly slight. The first category mentioned in the rule, joinder of offenses of the same or similar character, may be more problematic. The apparent circumstances of one robbery may be more aggravated than a second charged in the same indictment; a jury might be influenced in its assessment of guilt on the second by conclusions regarding character it reached in considering the first. But in such cases, separate trials are more likely than in the narcotics or mail fraud type of offense. Thus, even here, we believe the question of influence is one appropriate to be determined in each case where it arises; foreclosing use of the concurrent sentence doctrine would not be justified.

count—taking into account all the information available to him, but without regard to the defendant's valid conviction on other counts. And, of course, unless the record suggests otherwise, the presumption must be that the trial judge discharged his official responsibility properly. See *Wilson* v. *United States,* 369 F. 2d 198, 200 (C.A.D.C.); *Ferrari* v. *United States,* 169 F. 2d 353 (C.A. 9); *Turberville* v. *United States,* 303 F. 2d 411, 417 (C.A.D.C.) certiorari denied, 370 U.S. 946; *Stearns Co.* v. *United States,* 291 U.S. 54, 63.

Yates v. *United States, supra,* in which this Court did affirm one count but reversed as to the remainder and remanded the case for resentencing, is an example of the exceptional case. The petitioner there was charged with eleven specifications of contempt; this Court determined that properly there should have been only one specification and reversed as to the remainder. Because too many crimes had been charged, the Court vacated the sentence on the one good specification and remanded for resentencing. Nonetheless, the trial court reinstated its original sentence, and this Court was required to correct the sentence under its unique power to do so in criminal contempt cases. *Yates* v. *United States,* 356 U.S. 363. Thus, *Yates* affords no proper basis for concluding that in concurrent sentence cases generally the sentence on a valid count would have differed had the trial judge realized that the conviction on some other count was infected with error. Rather one must conclude, an additional "concurrent sentence * * * adds nothing to

their punishment." *Pierce* v. *United States,* 252 U.S. 239, 252–253.

In short, in the great majority of cases, no collateral legal consequences follow from the failure of the courts to review counts which do not affect a sentence imposed as the result of a single trial. Certainly, any additional social stigma that may be attributable to the conviction on a greater number of counts—factually, a doubtful proposition—is not sufficient to warrant appellate scrutiny. *United States* v. *Gonzalez,* 379 F. 2d 284, 285 (C.A. 2); see *St. Pierre* v. *United States,* 319 U.S. 41, 43; *United States* v. *National Plastikwear Fashions, Inc.,* 368 F. 2d 845, 846 (C.A. 2), certiorari denied *sub nom. Greene* v. *United States,* 386 U.S. 976; *United States* v. *Galante,* 298 F. 2d 72, 73 (C.A. 2). It follows, we submit, that the considerations which justify review of a conviction in cases allegedly moot or premature do not normally apply to the individual counts of a conviction as to which review has been denied through use of the concurrent sentence doctrine.

2. APPELLANTS SHOULD BEAR THE BURDEN OF SHOWING THE CIRCUMSTANCES, IF ANY, WHICH BAR APPLICATION OF THE CONCURRENT SENTENCE DOCTRINE TO THEIR APPEALS

In *Sibron* v. *New York, supra,* this Court placed upon the proponents of mootness the burden of showing that "there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction." 392 U.S. at 57. But this burden was imposed on the presumption that such consequences usually exist, as well as for reasons of justice and economy of judicial effort. As shown above,

neither the consequences nor the reasons are ordinarily applicable to cases in which the concurrent sentence doctrine might be applied, and the courts in applying the doctrine have been sensitive to the extraordinary case where they do occur. Thus, while harm may properly be presumed if no review at all should be granted a case, the presumption is improper where review is granted on some but not all counts carrying concurrent sentences.

Although it could hardly be denied that the constitutional requisites of standing and justiciability are met in cases subject to the concurrent sentence doctrine, see generally the discussion in *Flast* v. *Cohen*, 392 U.S. 83, 94–101, it does not follow that appellate courts should be obliged to review all claims of error made to them, including those which could confer no legal benefit on the appellant even if decided in his favor. This Court regularly follows the practice of not passing upon all arguments a party presents, if it determines that he must win or lose upon one. If review of the additional claims could lead to no different outcome or afford no relief, it would raise many of the risks inherent in advisory opinions; the "impact of actuality" and immediacy of injury ordinarily insisted upon for review not only influence the manner in which appellants present their claims, but also give impetus to the considered judicial evaluation of an issue. Cf. *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 346–348 (concurring opinion).

In our view, the concurrent sentence doctrine should thus be viewed as one application of the harmless error rule, which *requires* appellate courts to "give

judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. 2111; see also Rule 52, F.R. Crim. P.[14] No reason has been shown to make an exception here to the usual rule that an appellant must demonstrate that he has been harmed by the errors he alleges. Congress noted in enacting the predecessor of the current harmless error statute governing appeals (28 U.S.C. 2111) that "[t]he object of the * * * [statute] is to cast upon the party seeking a new trial the burden of showing that any technical errors that he may complain of have affected his substantial rights." H. Rep. No. 913, 65th Cong., 3d Sess., 1919; see 40 Stat. 1181; 1949 U.S. Code Cong. Service, pp. 1248, 1272. This is the recognized burden of appellants (*e.g., Palmer* v. *Hoffman,* 318 U.S. 109, 116; *Morgan* v. *United States,* 98 F. 2d 473, 477 (C.A. 8), certiorari denied, 305 U.S. 648), and there is nothing inherent in the nature or effect of the concurrent sentence doctrine to warrant a departure from that requirement.

C. AN ABANDONMENT OF THE CONCURRENT SENTENCE DOCTRINE WOULD UNNECESSARILY BURDEN THE ADMINISTRATION OF JUSTICE

Use of the concurrent sentence doctrines contributes

[14] Indeed, reviewing courts have sometimes stated directly that errors reaching less than all counts on which concurrent sentences have been imposed were "harmless." *United States* v. *Chow,* 398 F. 2d 596, 597 (C.A. 2); *Head* v. *United States,* 346 F. 2d 194, 196 (C.A. 9); *United States* v. *Berger,* 338 F. 2d 485, 488 (C.A. 2), certiorari denied, 380 U.S. 923.

substantially to judicial efficiency, by excusing appellate judges, who may otherwise have no choice as to the issues they must decide on an appeal, from the necessity of considering grounds of appeal which could not affect the legal outcome of the case. A study of the federal criminal cases filed in this Court during the current Term indicates the potential importance of this consideration. Convictions on multiple counts carrying concurrent sentences occurred in approximately 45 percent of the cases studied; the average number of counts in these cases was four.[15] Since a multiplicity of counts probably discourages appeal by making the chance for ultimate success appear less, the corresponding figures in the courts of appeals are probably at least as great. Invocation of the doctrine is possible whenever convictions on particular counts are challenged on grounds peculiar to themselves; such invocation may make it unnecessary to resort to a lengthy record to ascertain the sufficiency of the evidence on particular counts (*e.g., United States* v. *Berger,* 338 F. 2d 485, 488 (C.A. 2), certiorari denied, 380 U.S. 923), or, if conviction on one or more counts is wholly unchallenged, to write an opinion (*e.g., United States* v. *Lothridge,* 402 F. 2d 454 (C.A. 6);

[15] The criminal cases examined are those in which the government filed responses to petitions or appeals through February 14, 1969. There were 312 such cases. In 29, the exact nature of the sentence was not clear from the records available in the Department of Justice. Concurrent sentences were imposed in 126 of the remaining 283 cases. The number of counts upon which concurrent sentences were imposed ranged from 2 to 21.

Banzer v. *United States*, 367 F. 2d 865 (C.A. 9), certiorari denied, 385 U.S. 1009; *Spencer* v. *United States*, 355 F. 2d 921 (C.A. 9); *Vela* v. *United States*, 292 F. 2d 266 (C.A. 5)). Application of the doctrine in such cases serves to free the appellate courts to concentrate their limited time and energies upon those cases in which their decisions could afford the appellant practical relief.

In view of the swelling criminal caseload in the court of appeals, such conservation of judicial resources is becoming increasingly important. In the past ten years, the number of direct appeals from criminal convictions has risen by a factor of three and one half, from 599 to 2098; there are over two and one half times as many appeals from unsuccessful collateral attacks[16] by federal prisoners, 498 as opposed to 175; and the number of appeals from unsuccessful collateral attacks by state prisoners has risen from 77 to 1235, a factor of sixteen.[17] *1958 Annual Report of the Director of the Administrative Office of United States Courts* 148, 156; *1968 Annual Report of the Director of the Administrative Office of the United States Courts* 186–188. During this same period, the total number of judges on the courts of appeals has risen from 64 to 83, an increase of about one-third. *1958 Annual Report, supra,* at 143; *1968 Annual Report, supra,* at 90. The problems occasioned

[16] The concurrent sentence doctrine is, of course, as applicable to collateral attacks as it is to direct appeals.

[17] These figures represent the total number of such cases filed in the several circuits during the fiscal years ending on June 30, 1958, and June 30, 1968.

by this burgeoning workload are generating serious concern. See generally, Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law,* 82 Harv. L. Rev. 542 (1969). The concurrent sentence doctrine, together with other principles of restraint operating upon the appellate courts in the exercise of their power, must, as a practical matter, be recognized as having an impact in limiting the effect of this inundation. See Note, 103 Univ. of Pa. L. Rev. 772, 775 (1955). The abandonment of the doctrine could significantly aggravate the problem without affording any practical relief to the appellants involved.

For the foregoing reasons, it is respectfully submitted that this Court should hold that the concurrent sentence doctrine may be applied in the absence of any demonstration by a defendant that he will be subjected to a legal detriment if it is applied to his case.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 201

JOHN DALMER BENTON,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

In reply to the brief submitted by the Respondent, the Petitioner states the following argument.

ARGUMENT

The Maryland Rules of Procedure Allow the Reversal of an Invalid Conviction Regardless of Mootness.

The State of Maryland does not follow the mootness doctrine set out in *Hirabayashi* v. *United States*, 320 U.S. 81. Rule 764(a) of the Maryland Rules of Procedure on post conviction remedies provides that, "The court may correct an illegal sentence at any time." The Maryland Court of Appeals has consistently followed this rule and ordered the reversal of invalid convictions regardless of whether the sentence was ordered to be served concurrently with a valid conviction and regardless of whether

any sentence was imposed on the invalid conviction.[1] Illustratively, in *Marks* v. *State*, 230 Md. 108, 185 A2d 909 (1962), the appellant was charged in indictment No. 4073 with assault with intent to murder and in a second indictment, No. 4074, with assault with intent to maim and disfigure. Found guilty of both, appellant was sentenced to ten (10) years under the first indictment and a "like sentence" under the second indictment, the sentences to run concurrently. Holding that the verdict and sentence under the second indictment was null and void, because that indictment did not charge a crime known to the law of the State of Maryland, the court reversed the conviction and sentence rendered under the second indictment while affirming the valid conviction. To the same effect: *Hardesty* v. *State*, 223 Md. 559, 165 A2d 761 (1960); *Young* v. *State*, 220 Md. 95, 151 A2d 140 (1959); *Tucker* v. *State*, 237 Md. 422, 206 A2d 691 (1965).

It is respectfully submitted that in determining availability of relief for a conviction obtained in violation of the Federal Constitution, this Court should follow the Maryland post conviction remedy law. *Erie Railroad Company* v. *Tompkins*, 304 U.S. 64; *Case* v. *Nebraska*, 381 U.S. 336.

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[1] On page 6, footnote 3, of the Respondent's Brief, it is indicated that Maryland follows the *Hirabayashi* rule. This is not a fact.

SUPREME COURT OF THE UNITED STATES

No. 201.—October Term, 1968.

John Dalmer Benton, Petitioner, *v.* State of Maryland.	On Writ of Certiorari to the Court of Special Appeals of Maryland.

[June 23, 1969.]

Mr. Justice Marshall delivered the opinion of the Court.

In August 1965, petitioner was tried in a Maryland state court on charges of burglary and larceny. The jury found petitioner not guilty of larceny but convicted him on the burglary count. He was sentenced to 10 years in prison. Shortly after his notice of appeal was filed in the Maryland Court of Appeals, that court handed down its decision in the case of *Schowgurow* v. *State*, 240 Md. 121, 213 A. 2d 475 (1965). In *Schowgurow* the Maryland Court of Appeals struck down a section of the state constitution which required jurors to swear their belief in the existence of God. As a result of this decision, petitioner's case was remanded to the trial court. Because both the grand and petit juries in petitioner's case had been selected under the invalid constitutional provision, petitioner was given the option of demanding reindictment and retrial. He chose to have his conviction set aside, and a new indictment and new trial followed. At this second trial, petitioner was again charged with both larceny and burglary. Petitioner objected to retrial on the larceny count, arguing that because the first jury had found him not guilty of larceny, retrial would violate the constitutional prohibition against subjecting persons to double jeopardy for the same offense. The trial judge denied petitioner's motion to

dismiss the larceny charge, and petitioner was tried for both larceny and burglary. This time the jury found petitioner guilty of both offenses, and the judge sentenced him to 15 years on the burglary count [1] and 5 years for larceny, the sentences to run concurrently. On appeal to the newly created Maryland Court of Special Appeals, petitioner's double jeopardy claim was rejected on the merits. 1 Md. App. 647, 232 A. 2d. 541 (1967). The Court of Appeals denied discretionary review.

On the last day of last Term, we granted certiorari, 392 U. S. 925–926 (1968), but limited the writ to the consideration of two issues:

> "(1) Is the double jeopardy clause of the Fifth Amendment applicable to the States through the Fourteenth Amendment?
>
> "(2) If so, was the petitioner 'twice put in jeopardy' in this case?"

After oral argument, it became clear that the existence of a concurrent sentence on the burglary count might prevent the Court from reaching the double jeopardy issue, at least if we found that any error affected only petitioner's larceny conviction. Therefore, we scheduled the case for reargument, 393 U. S. 994 (1968), limited to the following additional question not included in the original writ:

> "Does the 'concurrent sentence doctrine,' enunciated in *Hirabayashi* v. *United States*, 320 U. S. 81, 105, and subsequent cases, have continuing validity in light of such decisions as *Ginsberg* v. *New York*,

[1] The increase in petitioner's sentence on the burglary count from 10 to 15 years is presently the subject of litigation on federal habeas corpus in the lower federal courts. A federal district court ordered the State to resentence petitioner, *Benton* v. *Coppinger*, 291 F. Supp. 141 (D. C. D. Md. 1968), and an appeal brought by the State is presently pending in the United States Court of Appeals for the Fourth Circuit.

390 U. S. 629, 633, n. 2; *Peyton* v. *Rowe*, 391 U. S. 54; *Carafas* v. *LaVallee*, 391 U. S. 234, 237–238; and *Sibron* v. *New York*, 392 U. S. 40, 50–58?"

The Solicitor General was invited to file a brief expressing the views of the United States and to participate in oral argument.

After consideration of all the questions before us, we find no bar to our decision of the double jeopardy issue. On the merits, we hold that the Double Jeopardy Clause of the Fifth Amendment is applicable to the States through the Fourteenth Amendment and we reverse petitioner's conviction for larceny.

I.

At the outset of this case we are confronted with a jurisdictional problem. If the error specified in the original writ of certiorari were found to affect only petitioner's larceny conviction,[2] reversal of that conviction would not require the State to change the terms of petitioner's confinement. Whatever the status of his sentence on the larceny conviction, petitioner would probably stay in prison until he had served out his sentence for burglary.[3] Is there, in these circumstances, a live "case" or "controversy" suitable for resolution by this Court, or is the issue moot? Is petitioner asking for an advisory opinion on an abstract or hypothetical question? The answer to these questions is crucial, for it is well settled that federal courts may only act in the context of a justiciable case or controversy. *Muskrat* v. *United States*, 219 U. S. 346 (1911); see *Flast* v. *Cohen*, 392 U. S. 83, 94–97 (1968).

[2] See Part V, *infra*. Of course, if the error infected both counts upon which petitioner was convicted, there would be no concurrent sentence problem at all. We do not, however, resolve the question of whether the burglary conviction was "tainted."

[3] The length of that sentence is presently a matter in dispute, see n. 1, *supra*.

The language used in a number of this Court's opinions might be read to indicate that the existence of a valid concurrent sentence removes the necessary elements of a justiciable controversy. The "concurrent sentence doctrine" took root in this Country quite early, although its earliest manifestations occurred in slightly different contexts. In *Locke* v. *United States*, 7 Cranch 339 (1813), a cargo belonging to the plaintiff in error had been condemned under a libel containing 11 counts. Chief Justice John Marshall, speaking for the Court, found it unnecessary to consider Locke's challenges to all 11 counts. He declared, simply enough, "The Court however, is of the opinion, that the 4th count is good, and this renders it unnecessary to decide on the others." *Id.*, at 344. Similar reasoning was later applied in a case where a single general sentence rested on convictions under several counts of an indictment. Drawing upon some English cases and some dicta from Lord Mansfield,[4] the Court in *Claassen* v. *United States*, 142 U. S. 140, 146 (1891), held that if the defendant had validly been convicted on any one count "the other counts need not be considered." The most widely cited application of this approach to cases where concurrent sentences, rather than a single general sentence, have been imposed is *Hirabayashi* v. *United States*, 320 U. S. 81 (1943). In that case the defendant had been found guilty of two different offenses and had received concurrent three-month sentences. He challenged the constitutionality of both convictions, but this Court affirmed the lower court's judgment after considering and rejecting only one of his challenges. Since the conviction on the second count was valid, the Court found it "unnecessary" to consider the challenge to the first count. *Id.*, at 85, 105.

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[4] *Grant* v. *Astle*, 2 Doug. 722, 99 Eng. Rep. 459 (1781); *Peake* v. *Oldham*, 1 Cowper 275, 98 Eng. Rep. 1083 (1775); *Rex.* v. *Benfield*, 2 Burr. 980, 97 Eng. Rep. 664 (1760).

The concurrent sentence doctrine has been widely, if somewhat haphazardly, applied in this Court's decisions. At times the Court has seemed to say that the doctrine raises a jurisdictional bar to the consideration of counts under concurrent sentences. Some opinions have baldly declared that judgments of conviction "must be upheld" if any one count was good. *Barenblatt* v. *United States*, 360 U. S. 109, 115 (1959); see *United States* v. *Gainey*, 380 U. S. 63, 65 (1965). In other cases the Court has chosen somewhat weaker language, indicating only that a judgment "may be affirmed if the conviction on either count is valid." *Roviaro* v. *United States*, 353 U. S. 53, 59, n. 6 (1957). And on at least one occasion, the Court has ignored the rule entirely and decided an issue that affected only one count, even though there were concurrent sentences. *Putnam* v. *United States*, 162 U. S. 687 (1896).

One can search through these cases, and related ones, without finding any satisfactory explanation for the concurrent sentence doctrine. See *United States* v. *Hines*, 256 F. 2d 561, 562–563 (C. A. 2d Cir. 1958). But whatever the underlying justifications for the doctrine, it seems clear to us that it cannot be taken to state a jurisdictional rule. See *Yates* v. *United States*, 355 U. S. 66, 75–76 (1957); *Putnam* v. *United States*, *supra*. Moreover, whatever may have been the approach in the past, our recent decisions on the question of mootness in criminal cases make it perfectly clear that the existence of concurrent sentences does not remove the elements necessary to create a justiciable case or controversy.

In *Sibron* v. *New York*, 392 U. S. 40 (1968), we held that a criminal case did not become moot upon the expiration of the sentence imposed. We noted "the obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences." *Id.*, at 55. We concluded that the mere possibility of such collateral

consequences was enough to give the case the "impact of actuality" which was necessary to make it a justiciable case or controversy. *Sibron* and a number[5] of other recent cases have canvassed the possible adverse collateral effects of criminal convictions,[6] and we need not repeat that analysis here. It is enough to say that there are such possibilities in this case. For example, there are a few States which consider all prior felony convictions for the purpose of enhancing sentence under habitual criminal statutes, even if the convictions actually constituted only separate counts in a single indictment tried on the same day.[6] Petitioner might some day in one of these States have both his larceny and burglary convictions counted against him. Although this possibility may well be a remote one, it is enough to give this case an adversary cast and make it justiciable. Moreover, as in *Sibron*, both of petitioner's convictions might some day be used to impeach his character if put in issue at a future trial. Although petitioner could explain that both convictions arose out of the same transaction, a jury might not be able to appreciate this subtlety.

We cannot, therefore, say that this Court lacks jurisdiction to decide petitioner's challenge to his larceny conviction. It may be that in certain circumstances a federal appellate court, as a matter of discretion, might decide (as in *Hirabayashi*) that it is "unnecessary" to consider all the allegations made by a particular party.[7]

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[5] *Street* v. *New York*, 394 U. S. —, —, n. 3 (1969); *Carafas* v. *LaVallee*, 391 U. S. 234, 237–238 (1968); *Ginsberg* v. *New York*, 390 U. S. 629, 633–634, n. 2 (1968).

[6] The majority rule is, apparently, that all convictions handed down at the same time count as a single conviction for the purpose of habitual offender statutes, but a few States follow the stricter rule described in the text. The relevant cases are collected at 24 A. L. R. 2d 1262–1267 (1952), and in the accompanying supplements.

[7] In *Sibron* we noted the inadequacies of a procedure which postpones appellate review until it is proposed to subject the convicted person to collateral consequences. 392 U. S., at 56–57. For the

The concurrent sentence rule may have some continuing validity as a rule of judicial convenience. That is not a subject we must canvass today, however. It is sufficient for present purposes to hold that there is no jurisdictional bar to consideration of challenges to multiple convictions, even though concurrent sentences were imposed.

II.

While Maryland apparently agrees that there is no jurisdictional bar to consideration of petitioner's larceny conviction, it argues that the possibility of collateral consequences is so remote in this case that any double jeopardy violation should be treated as a species of "harmless error." The Solicitor General, while not commenting at length on the facts of this particular case, suggests that we treat the concurrent sentence doctrine as a principle of judicial efficiency which permits judges to avoid decision of issues which have no appreciable impact on the rights of any party. Both Maryland and the Solicitor General argue that the defendant should bear the burden of convincing the appellate court of the need to review all his concurrent sentences. Petitioner, on the other hand, sees in *Sibron* a command that federal appellate courts treat all errors which may possibly affect a defendant's rights, and he argues that the concurrent sentence rule therefore has no continuing validity, even as a rule of convenience.

Because of the special circumstances in this case, we find it unnecessary to resolve this dispute. For even if the concurrent sentence doctrine survives as a rule of judicial convenience, we find good reason not to apply it here. On direct appeal from petitioner's conviction, the

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reasons there stated, an attempt to impose collateral consequences after an initial refusal to review a conviction on direct appeal because of the concurrent sentence doctrine may well raise some constitutional problems. That issue is not, however, presented by this case, and accordingly we express no opinion on it.

Maryland Court of Special Appeals did in fact rule on his double jeopardy challenge to the larceny count. 1 Md. App., at 650–651, 232 A. 2d, at 542–543. It is unclear whether Maryland courts always consider all challenges raised on direct appeal, notwithstanding the existence of concurrent sentences,[8] but at least in this case the State decided not to apply the concurrent sentence rule. This may well indicate that the State has some interest in keeping the larceny conviction alive;[9] if, as Maryland argues here, the larceny conviction is of no importance to either party, one wonders why the state courts found it necessary to pass on it. Since the future importance of the conviction may well turn on issues of state law about which we are not well informed, we propose, on direct appeal from the Maryland courts, to accept their judgment on this question. Since they decided this federal constitutional question, we see no reason why we should not do so as well. Moreover, the status of petitioner's burglary conviction and the eventual length of his sentence are both still in some doubt.[10] Should any attack on the burglary conviction be successful, or should the length of the burglary sentence be reduced to less than five years, petitioner would then clearly have a right to have his larceny conviction reviewed. As we said in *Sibron* v. *New York*, *supra*, at 56–57, it is certainly preferable to have that review now on direct appeal, rather than later.[11] For

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[8] Compare *Meade* v. *State*, 198 Md. 489, 84 A. 2d 892 (1951), with *Marks* v. *State*, 230 Md. 108, 185 A. 2d 909 (1962).

[9] See n. 7, *supra*.

[10] See n. 1, *supra*, and Part V, *infra*.

[11] A stronger case for total abolition of the concurrent sentence doctrine may well be made in cases on direct appeal, as compared to convictions attacked collaterally by suits for postconviction relief. Because of our disposition of this case, we need not reach this question.

these reasons, and because there is no jurisdictional bar, we find it appropriate to reach the questions specified in our original writ of certiorari.

III.

In 1937, this Court decided the landmark case of *Palko* v. *Connecticut*, 302 U. S. 319. Palko, although indicted for first-degree murder, had been convicted of murder in the second degree after a jury trial in a Connecticut state court. The State appealed and won a new trial. Palko argued that the Fourteenth Amendment incorporated, as against the States, the Fifth Amendment requirement that no person "be subject for the same offence to be twice put in jeopardy of life or limb." The Court disagreed. Federal double jeopardy standards were not applicable against the States. Only when a kind of jeopardy subjected a defendant to "a hardship so acute and shocking that our polity will not endure it," *id.*, at 328, did the Fourteenth Amendment apply. The order for a new trial was affirmed. In subsequent appeals from state courts, the Court continued to apply this lesser *Palko* standard. See, *e. g.*, *Brock* v. *North Carolina*, 344 U. S. 424 (1953).

Recently, however, this Court has "increasingly looked to the specific guarantees of the [Bill of Rights] to determine whether a state criminal trial was conducted with due process of law." *Washington* v. *Texas*, 388 U. S. 14, 18 (1967). In an increasing number of cases, the Court "has rejected the notion that the Fourteenth Amendment applies to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights . . . .'" *Malloy* v. *Hogan*, 378 U. S. 1, 10–11 (1964).[12] Only last Term we found that the right to trial

[12] Quoting from *Ohio ex rel. Eaton* v. *Price*, 364 U. S. 263, 275 (1960) (BRENNAN, J., dissenting).

by jury in criminal cases was "fundamental to the American scheme of justice," *Duncan* v. *Louisiana*, 391 U. S. 145, 149 (1968), and held that the Sixth Amendment right to a jury trial was applicable to the States through the Fourteenth Amendment.[13] For the same reasons, we today find that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment. Insofar as it is inconsistent with this holding, *Palko* v. *Connecticut* is overruled.

Palko represented an approach to basic constitutional rights which this Court's recent decisions have rejected. It was cut of the same cloth as *Betts* v. *Brady*, 316 U. S. 455 (1942), the case which held that a criminal defendant's right to counsel was to be determined by deciding in each case whether the denial of that right was "shocking to the universal sense of justice." *Id.*, at 462. It relied upon *Twining* v. *New Jersey*, 211 U. S. 78 (1908), which held that the right against compulsory self-incrimination was not an element of Fourteenth Amendment due process. *Betts* was overruled by *Gideon* v. *Wainwright*, 372 U. S. 335 (1963); *Twining*, by *Malloy* v. *Hogan*, 378 U. S. 1 (1964). Our recent cases have thoroughly rejected the *Palko* notion that basic constitutional rights can be denied by the States as long as the totality of the circumstances do not disclose a denial of "fundamental fairness." Once it is decided that a particular Bill of Rights guarantee is "fundamental to the American scheme of justice," *Duncan* v. *Louisiana*, *supra*, at 149, the same constitutional standards apply against both the State and Federal Governments. *Palko's* roots had thus

[13] A list of those Bill of Rights guarantees which have been held "incorporated" in the Fourteenth Amendment can be found in *Duncan*, *supra*, at 148.

been cut away years ago. We today only recognize the inevitable.

The fundamental nature of the guarantee against double jeopardy can hardly be doubted. Its origins can be traced to Greek and Roman times, and it became established in the common law of England long before this Nation's independence.[14] See *Bartkus* v. *Illinois*, 359 U. S. 121, 151–155 (1959) (BLACK, J., dissenting). As with many other elements of the common law, it was carried into the jurisprudence of this Country through the medium of Blackstone, who codified the doctrine in his Commentaries. "[T]he plea of *autrefoits acquit*, or a former acquittal," he wrote, "is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence." [15] Today, every State incorporates some form of the prohibition in its constitution or common law.[16] As this Court put it in *Green* v. *United States*, 355 U. S. 184, 187–188 (1957), "[t]he underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." This underlying notion has from the very beginning been part of our constitutional tradition. Like the right to trial by jury, it is clearly "fundamental to the American scheme of justice." The validity of petitioner's larceny conviction must be judged not by

[14] J. Sigler, Double Jeopardy 1–37 (1969).

[15] 4 Blackstone, Commentaries *334.

[16] J. Sigler, *supra*, n. 14, at 78–79; *Brock* v. *North Carolina*, 344 U. S. 424, 435, n. 6 (1953) (Vinson, C. J., dissenting).

the watered-down standard enunciated in *Palko*, but under this Court's interpretations of the Fifth Amendment double jeopardy provision.

IV.

It is clear that petitioner's larceny conviction cannot stand once federal double jeopardy standards are applied. Petitioner was acquitted of larceny in his first trial. Because he decided to appeal his burglary conviction, he is forced to suffer retrial on the larceny count as well. As this Court held in *Green* v. *United States*, *supra*, at 193–194, "[c]onditioning an appeal on one offense on a coerced surrender of a valid plea of former jeopardy on another offense exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy."

Maryland argues that *Green* does not apply to this case because petitioner's original indictment was absolutely void. One cannot be placed in "jeopardy" by a void indictment, the State argues. This argument sounds a bit strange, however, since petitioner could quietly have served out his sentence under this "void" indictment had he not appealed his burglary conviction. Only by accepting the option of a new trial could the indictment be set aside; at worst the indictment would seem only voidable at a defendant's option, not absolutely void. In any case, this argument was answered here over 70 years ago in *United States* v. *Ball*, 163 U. S. 662 (1896). In that case Millard Fillmore Ball was indicted, together with two other men, for the murder of one William T. Box in the Indian Territory. He was acquitted and his codefendants were convicted. They appealed and won a reversal on the ground that the indictment erroneously failed to aver the time or place of Box's death. All three defendants were retried, and this time Ball was convicted. This Court sustained his double jeopardy claim, notwithstanding the technical invalidity of the

indictment upon which he was first tried. The Court refused to allow the Government to allege its own error to deprive the defendant of the benefit of an acquittal by a jury. *Id.*, at 667–668. "[A]lthough the indictment was fatally defective, yet, if the court had jurisdiction of the cause and of the party, its judgment is not void, but only voidable by writ of error . . . . ," and the Government could not have the acquittal set aside over the defendant's objections. *Id.*, at 669–670. This case is totally indistinguishable. Petitioner was acquitted of larceny. He has, under *Green*, a valid double jeopardy plea which he cannot be forced to waive. Yet Maryland wants the earlier acquittal set aside, over petitioner's objections, because of a defect in the indictment. This it cannot do. Petitioner's larceny conviction cannot stand.

V.

Petitioner argues that his burglary conviction should be set aside as well. He contends that some evidence, inadmissible under state law in a trial for burglary alone, was introduced in the joint trial for both burglary and larceny, and that the jury was prejudiced by this evidence.[17] This question was not decided by the Maryland Court of Special Appeals because it found no double jeopardy violation at all. It is not obvious on the face of the record that the burglary conviction was affected by the double jeopardy violation. To determine whether there is in fact any such evidentiary error, we would have to explore the Maryland law of evidence and the Maryland definitions of larceny and burglary, and then examine the record in detail. We do not think that this is

[17] There is no danger here that the jury might have been tempted to compromise on a lesser charge because of an erroneous retrial on a greater charge. See *United States ex rel. Hetenyi* v. *Wilkins*, 348 F. 2d 844, 866 (C. A. 2d Cir. 1965), cert. denied, 383 U. S. 913 (1966). Larceny is a lesser offense than burglary.

the kind of determination we should make unaided by prior consideration by the state courts.[18] Accordingly, we think it "just under the circumstances," 28 U. S. C. § 2106, to vacate the judgment below and remand for consideration of this question. The judgment is vacated and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

[18] See Note, Individualized Criminal Justice in the Supreme Court: A Study of Dispositional Decisional Making, 81 Harv. L. Rev. 1260, 1272–1273 (1968).

SUPREME COURT OF THE UNITED STATES

No. 201.—October Term, 1968.

John Dalmer Benton, Petitioner, v. State of Maryland. | On Writ of Certiorari to the Court of Special Appeals of Maryland.

[June 23, 1969.]

Mr. Justice White, concurring.

While I agree with the Court's extension of the prohibition against double jeopardy to the States, and with the Court's conclusion that the concurrent sentence rule constitutes no jurisdictional bar, additional comment on the wisdom and effects of applying a concurrent sentence rule seems appropriate.

In a time of increasingly congested judicial dockets, often requiring long delays before trial and upon appeal, judicial resources have become scarce. Where a man has been convicted on several counts and sentenced concurrently upon each, and where judicial review of one count sustains its validity, the need for review of the other counts is not a pressing one since, regardless of the outcome, the prisoner will remain in jail for the same length of time under the first count. Rather than permit other cases to languish while careful review of these redundant counts is carried to its futile conclusion, judicial resources might be better employed by moving on to more pressing business. This is not a rule of convenience to the judge, but rather of fairness to other litigants.

This is not to say, however, that the fact of conviction under the unreviewed counts could never be of importance to the prisoner. After his release it is possible they might be used against him in a recidivism prosecution, or used to impeach his testimony in a trial for another

offense, to pick two obvious examples. Nevertheless, the unreviewed counts are, by hypothesis, not of immediate importance to his confinement, and our experience gives us no indication that they are frequently of such importance later that the concurrent sentence rule should not be applied.

The unreviewed count is often one of which, but for the concurrent sentence rule, the prisoner would have a right to review, either directly or on collateral attack. Arguably, to deny him that right when another man, convicted after a separate trial on each count, or sentenced consecutively, could not be denied that right under the applicable state or federal law, raises an equal protection question. But clearly so long as the denied review is of no significance to the prisoner the denial of equal protection is not invidious but only theoretical.

But should a situation arise in which the convict can demonstrate that the unreviewed count is being used against him, so as to work some harm to him additional to that stemming from the reviewed count, his grievance becomes real. At that point it may be that the unreviewed count may not be used against him, unless it is determined that the lack of earlier review can be cured by then supplying the convict the review to which he would earlier have been entitled but for his concurrent sentence on another count. For myself, postponed review, a question which the Court reserves (n. 7, *supra*), presents no insuperable difficulties. Appellate review is always conducted on a cold record, and collateral proceedings frequently deal with a stale record and stale facts. There is nothing inherently unfair in permitting the record to become colder while it is irrelevant to any human need, and other litigants' demands are more pressing. Whether reversal on such a record, after delayed review, would permit retrial or a hearing on a claim involving, for example, a coerced confession, is

yet a further question which there is no present need to address. Should a satisfactory hearing or retrial prove impossible this would be an unfortunate byproduct of an initially crowded docket.

For the foregoing reasons, I agree with the Court that the concurrent sentence rule, while not of jurisdictional dimensions, should be preserved as a matter of proper judicial administration both on direct appeal and collateral attack, although at least in theory it raises a number of questions concerning the subsequent effects of the unreviewed counts. It may be that where it can be reliably predicted in a particular case that each count would entail concrete prejudicial consequences at a later date, the appellate court at the time of initial review would prefer to deal with all counts rather than to apply the concurrent sentence rule.

SUPREME COURT OF THE UNITED STATES

No. 201.—October Term, 1968.

John Dalmer Benton, Petitioner, v. State of Maryland. | On Writ of Certiorari to the Court of Special Appeals of Maryland.

[June 23, 1969.]

Mr. Justice Harlan, whom Mr. Justice Stewart joins, dissenting.

One of the bedrock rules that has governed, and should continue to govern, the adjudicative processes of this Court is that the decision of constitutional questions in the disposition of cases should be avoided whenever fairly possible. Today the Court turns its back on that sound principle by refusing, for the flimsiest of reasons, to apply the "concurrent sentence doctrine" so as not to be required to decide the far-reaching question whether the Double Jeopardy Clause of the Fifth Amendment is "incorporated" into the Due Process Clause of the Fourteenth, thereby making the former applicable lock, stock, and barrel to the States. Indeed, it is quite manifest that the Court has actually been at pains to "reach out" to decide that very important constitutional issue.

I consider that the concurrent sentence doctrine is applicable here, and that dismissal of the writ is accordingly called for. Despite that, I feel constrained also to express my views on the merits because of what I conceive to be the importance of the constitutional approach at stake.

I.

The Court decides, and I agree, that petitioner's larceny conviction is not moot, and that the concurrent sentence doctrine is not a *jurisdictional* bar to entertainment of challenges to multiple convictions, so long as

the convictions sought to be reviewed are not moot. However, I would also emphasize, in agreement with the position of the Government as *amicus curiae*, that the concurrent sentence rule does have continuing vitality as an element of judicial discretion, and that appellate courts may decline to review a conviction carrying a concurrent sentence when another "concurrent" conviction has been reviewed and found valid and the unreviewed conviction foreseeably will have no significant adverse consequences for the appellant. As the Solicitor General has pointed out, the concurrent sentence doctrine plays a significant role in conserving the time and energy of appellate courts.[1] To require that these already overworked courts[2] invariably review in full detail each of several convictions carrying concurrent sentences seems to me senselessly doctrinaire.[3]

A.

As has been noted, the concurrent sentence doctrine is applicable only if there exists a valid concurrent conviction. In this instance, petitioner's double jeopardy argument is directed to his larceny conviction, but he claims that the concurrent sentence doctrine is no impediment to reaching that question because his concurrent, and otherwise valid, burglary conviction was tainted by having been tried together with the larceny count.

[1] See Memorandum for the United States as Amicus Curiae 20–23. Counsel for the Government estimated during oral argument that the concurrent sentence doctrine is employed in the disposition of about 10% of all federal criminal appeals.

[2] See, *e. g.*, Carrington, Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law, 82 Harv. L. Rev. 542 (1969).

[3] Like the Court, see *ante*, n. 7, I express no view on the question whether collateral consequences may constitutionally be imposed on account of a conviction which was denied review on direct appeal because of the concurrent sentence doctrine.

It is therefore necessary to consider whether this claim of taint has merit.

The Court finds that resolution of the taint issue is likely to involve such difficult points of Maryland law as to make a remand to the Maryland courts the soundest course. See *ante*, at 13–14. However, my examination of the question convinces me that the pertinent Maryland law is quite elementary. And, unlike the Court, I am not deterred by the prospect of having to "examine . . . in detail," *ante*, at 13, the 42-page record of petitioner's second trial.

I conclude that there was no real possibility of taint. Burglary in Maryland consists of breaking and entering any dwelling house in the nighttime with intent to steal, take, or carry away the personal goods of another. See Md. Code, Art. 27, § 30 (a) (1967). Larceny in Maryland is a common-law crime, consisting of the taking and carrying away of the personal property of another with intent to deprive the owner of the property permanently. See, *e. g.*, *Fletcher* v. *State*, 231 Md. 190, 189 A. 2d 641 (1963). Evidence was introduced at petitioner's second trial to show that he not only entered a locked house at night but also made off with several household appliances. The latter evidence was, of course, pertinent to the larceny count. However, it was also plainly relevant to the burglary count, since it tended to show intent to steal.

Petitioner bases his taint argument primarily on the proposition that he was entitled to have the evidence concerning the missing appliances excluded from his second trial under the doctrine of "collateral estoppel," he having been acquitted of larceny at the first trial. However, even if it is assumed that the conviction on the larceny count was bad on double jeopardy or due process grounds and that the principle of collateral estoppel has some application to state criminal trials

through the Due Process Clause of the Fourteenth Amendment,[4] I think that the doctrine would not prevent admission of the evidence on the issue of burglary. The principle of collateral estoppel makes conclusive, in collateral proceedings, only those matters which were "actually litigated and determined in the original action . . . ." *Cromwell* v. *County of Sac*, 94 U. S. 351, 353 (1877).[5] The Maryland Constitution provides:

> "In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction." Md. Const., Art. 15, § 5.

Hence, petitioner's acquittal of larceny at his first trial may have rested solely upon that jury's unique view of the *law* concerning that offense, and cannot be taken as having necessarily "determined" any particular question of fact.

It follows from what has been said in this section that there can be no estoppel effect in a collateral proceeding, such as petitioner's second trial for burglary, and that petitioner's taint argument must fail.[6]

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[4] This Court said in dictum in *Hoag* v. *New Jersey*, 356 U. S. 464, 471 (1958): "Despite its wide employment, we entertain grave doubts whether collateral estoppel can be regarded as a constitutional requirement. Certainly this Court has never so held." See also *id.*, at 470–471; *Sealfon* v. *United States*, 332 U. S. 575 (1948); *United States* v. *Oppenheimer*, 242 U. S. 85, 88 (1916).

[5] See also Restatement, Judgments § 68 (1).

[6] The Court also suggests that the concurrent sentence doctrine should not be applied for the additional reason that the eventual length of petitioner's burglary sentence is "still in some doubt." See *ante*, at 8. Petitioner received a 10-year sentence following his first burglary conviction and a 15-year sentence after his second conviction. The latter sentence was subsequently vacated and resentencing ordered by a federal district court. See *Benton* v. *Copinger*, 291 F. Supp. 141 (1968). The State has appealed. Whatever the

B.

Since petitioner's second burglary conviction was not tainted by his simultaneous trial for larceny, it is necessary to consider whether the concurrent sentence doctrine is inapplicable for the other possible reason: that petitioner foreseeably will suffer significant adverse consequences on account of his larceny conviction.[7]

No such consequences can reasonably be predicted. The Court itself notes that only a "few States" would allow petitioner's larceny conviction to be used against him for purposes of sentencing as a habitual offender, and concedes that "this possibility may well be a remote one." *Ante,* at 6. When it is recalled that petitioner had been convicted of three felonies even prior to his present burglary conviction,[8] this possibility is reduced to the vanishing point.[9]

There remain the possibilities that petitioner's larceny conviction might be considered generally by a judge if and when petitioner is sentenced following some future conviction, and that the conviction might be used to impeach him in future judicial proceedings. In the circumstances of this case, these potential consequences are plainly insignificant. Petitioner's burglary and larceny convictions were based upon the very same series of acts on his part. This fact could readily be brought to the attention either of a sentencing judge or of a trier of fact before whom petitioner was sought to be impeached.

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outcome of that appeal, I consider that the probability of petitioner's burglary sentence being reduced below five years, so as to make the concurrent sentence doctrine inoperative, is manifestly negligible.

[7] Cf., *e. g., Sibron* v. *New York,* 392 U. S. 40, 55–56 (1968).

[8] See Supplementary Brief for Respondent 20, n. 6.

[9] So far as I have been able to discover, there is no State in which petitioner's larceny conviction could have habitual offender consequences.

Predictably, knowledge of the identical origin of the two convictions would reduce the extra impact of the larceny conviction to negligible proportions. Thus, it would be difficult to imagine a case in which a "concurrent" conviction would be likely to entail fewer adverse consequences.

C.

The Court nonetheless holds that "[b]ecause of special circumstances in this case" it will not apply the concurrent sentence doctrine, and that it is unnecessary even to decide whether the doctrine has "continuing validity, even as a rule of judicial convenience." See *ante*, at 7. One of the "special circumstances" cited by the Court is the existence of the "taint" issue, which the Court finds it desirable to remand to the state courts. As has been noted, I can perceive no difficulties which would justify a remand.

The second of the "special circumstances" relied on by the Court is that "in this case the [state courts] decided not to apply the concurrent sentence rule" and reached the "double jeopardy" issue themselves. See *ante*, at 8. The Court concludes that "[s]ince [the Maryland courts] decided the federal constitutional question, we see no reason why we should not do so as well." *Ibid.* This reasoning baffles me. In determining whether or not to reach a constitutional issue the decision of which is not absolutely necessary to the disposition of a case, this Court has long been guided by the rule that "[w]here a case . . . can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons." *Siler* v. *Louisville & N. R. Co.*, 213 U. S. 175, 191–193 (1909); see *Ashwander* v. *TVA*, 297 U. S. 288, 345 (1936) (Brandeis, J., concurring). In deciding whether such "impor-

tant reasons" exist, this Court has never regarded itself as bound to reach the constitutional issue merely because the court below did so, and has often declined to pass upon constitutional questions even though fully canvassed by the lower court.[10] On some of these occasions, the Court has relied in justification upon the concurrent sentence doctrine.[11]

Since I cannot believe that the Court wishes as a general matter to abandon the salutary and well-established principle of declining to rule on constitutional questions in advance of necessity, and since I find the "taint" issue entirely free of the complexities which the Court claims to perceive, I cannot help but conclude that the real reason for reaching the "double jeopardy" issue in this case is the Court's eagerness to see that provision "incorporated" into the Fourteenth Amendment and thus made applicable against the States.

D.

As has been shown, this case satisfies both preconditions to application of the concurrent sentence doctrine. Reliance upon that doctrine would enable the Court to avoid decision of a substantial constitutional question. Accordingly, I would apply the concurrent sentence rule and decline to review petitioner's larceny conviction. Since the case was brought here on a writ of certiorari limited to the "double jeopardy" question, decision of which would affect only the larceny conviction, I would dismiss the writ as improvidently granted.

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[10] See, *e. g.*, *Cichos* v. *Indiana*, 385 U. S. 76 (1966); *Hamm* v. *City of Rock Hill*, 379 U. S. 306 (1964); *Bell* v. *Maryland*, 378 U. S. 226 (1964); *Machinists* v. *Street*, 367 U. S. 740 (1961); *Rice* v. *Sioux City Cemetery*, 349 U. S. 70 (1955).

[11] See, *e. g.*, *United States v. Gainey*, 380 U. S. 63 (1965); *Barenblatt* v. *United States*, 360 U. S. 109 (1959).

II.

Having concluded that the writ should be dismissed, I would ordinarily not go further. However, as indicated at the outset, I feel impelled to continue with some observations respecting what can only be regarded as a complete overruling of one of this Court's truly great decisions, and with an expression of my views as to how petitioner's claim respecting his retrial for larceny should fare under the traditional due process approach.

A.

I would hold, in accordance with *Palko* v. *Connecticut*, 302 U. S. 319 (1937), that the Due Process Clause of the Fourteenth Amendment does not take over the Double Jeopardy Clause of the Fifth, as such. Today *Palko* becomes another casualty in the so far unchecked march towards "incorporating" much, if not all, of the Federal Bill of Rights into the Due Process Clause. This march began, with a Court majority, in 1961 when *Mapp* v. *Ohio*, 367 U. S. 643 (1961), was decided and, before the present decision, found its last stopping point in *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), decided at the end of last Term. I have at each step in the march expressed my opposition, see, *e. g.*, my opinions in *Mapp* v. *Ohio*, *supra*, at 672 (dissenting); *Ker* v. *California*, 374 U. S. 23, 44 (1963) (concurring); *Malloy* v. *Hogan*, 378 U. S. 1, 14 (1964) (dissenting); *Pointer* v. *Texas*, 380 U. S. 400, 408 (1965) (concurring); *Griffin* v. *California*, 380 U. S. 609, 615 (1965) (concurring); *Klopfer* v. *North Carolina*, 386 U. S. 213, 226 (1967) (concurring); *Duncan* v. *Louisiana*, *supra*, at 171 (dissenting), and more particularly in the *Duncan* case undertook to show that the "selective incorporation"

doctrine finds no support either in history or in reason.[12] Under the pressures of the closing days of the Term, I am content to rest on what I have written in prior opinions, save to raise my voice again in protest against a doctrine which so subtly, yet profoundly, is eroding many of the basics of our federal system.

More broadly, that this Court should have apparently become so impervious to the pervasive wisdom of the constitutional philosophy embodied in *Palko*, and that it should have felt itself able to attribute to the perceptive and timeless words of Mr. Justice Cardozo nothing more than a "watering down" of constitutional rights, are indeed revealing symbols of the extent to which we are weighing anchors from the fundamentals of our constitutional system.

B.

Finally, how should the validity of petitioner's larceny conviction be judged under *Palko*, that is, under due process standards?

A brief recapitulation of the facts first seems advisable. Petitioner was indicted and tried simultaneously for burglary and larceny. He was acquitted of larceny but convicted of burglary. Petitioner appealed, and the Maryland courts remanded in light of earlier Maryland decisions holding invalid a provision of the Maryland

[12] In the interest of strict accuracy, it should be pointed out that MR. JUSTICE STEWART cannot and does not fully join in the above sentence of this opinion. He joined my dissenting opinion in *Duncan* v. *Louisiana*, *supra*, but wrote a separate memorandum in *Mapp* v. *Ohio*, *supra*, at 672; joined the opinion of Mr. Justice Clark in *Ker* v. *California*, *supra*; joined MR. JUSTICE WHITE's dissenting opinion in *Malloy* v. *Hogan*, *supra*, at 33; wrote an opinion concurring in the result in *Pointer* v. *Texas*, *supra*, at 409; wrote a dissenting opinion in *Griffin* v. *California*, *supra*, at 617; and separately concurred in the result in *Klopfer* v. *North Carolina*, *supra*, at 226.

Constitution requiring that grand and petit jurors declare their belief in God. Petitioner was given the option either of accepting the result of his trial or of demanding reindictment and retrial. He chose to attack the indictment, was reindicted and retried for both larceny and burglary, and was convicted of both offenses.

The principle that an accused should not be tried twice for the same offense is deeply rooted in Anglo-American law.[13] In this country, it is presently embodied in the Fifth Amendment to the Federal Constitution and in the constitution or common law of every State.[14] The *Palko* Court found it unnecessary to decide "[w]hat the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him . . . ." 302 U. S., at 328. However, I have no hesitation in stating that it would be a denial of due process at least for a State to retry one previously acquitted following an errorless trial. The idea that the State's interest in convicting wrongdoers is entirely satisfied by one fair trial ending in an acquittal, and that the accused's interest in repose must thereafter be given precedence, is indubitably a " 'principle so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " *Id.*, at 325.

The situation in this case is not quite so simple. Had petitioner not appealed his burglary conviction, the State would surely have allowed him to rest on his larceny acquittal and merely serve out his burglary sentence. However, the State argues that the burglary and larceny counts were originally contained in a single indictment;

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[13] The "double jeopardy" concept has been an established part of the English common law since at least 1700, and was contained in the constitutions or common law of many American jurisdictions prior to 1787. See J. Sigler, Double Jeopardy 1–37 (1969); *Bartkus* v. *Illinois*, 359 U. S. 121, 151–155 (1959) (BLACK, J., dissenting).

[14] See J. Sigler, *supra*, at 77–117.

that upon petitioner's appeal the indictment was declared totally void and the trial court found to have lacked jurisdiction; and that the State could then proceed as if there had never been a previous indictment or trial.

The State's contention that petitioner's first trial was a complete nullity because the trial court "lacked jurisdiction" is unconvincing. As has been noted, it appears that the State would willingly have seen petitioner serve out the burglary sentence imposed in consequence of that trial. Under state procedure, petitioner could avail himself of the "jurisdictional" defect only by appealing his conviction. The crucial issue, therefore, is what legitimate interest had the State in compelling petitioner to jeopardize his larceny acquittal as a condition of appealing his burglary conviction?

I can perceive no legitimate state interest. Certainly it is the purest fiction to say that by appealing his burglary conviction petitioner "waived" his right not to be retried for larceny or "consented" to retrial on that charge. The notion of "waiver" was first employed in *United States* v. *Ball*, 163 U. S. 662 (1896), to justify retrial of an accused for the same offense following reversal of a conviction on appeal. The "waiver" doctrine was more fully articulated in *Trono* v. *United States*, 199 U. S. 521 (1905), where it was held that retrial and conviction for murder following a successful appeal from a manslaughter conviction did not violate the Double Jeopardy Clause.[15] *Trono* apparently dictated the result in *Brantley* v. *Georgia*, 217 U. S. 284 (1910), in which the Court held in a brief *per curiam*, without citing any

[15] In the federal realm, the *Trono* decision was, of course, limited to its "peculiar factual setting" by *Green* v. *United States*, 355 U. S. 184, 197 (1957), in which I joined the dissenting opinion of Mr. Justice Frankfurter, *id.*, at 198. MR. JUSTICE STEWART was not a member of the Court at the time *Green* was decided.

authority, that a Georgia retrial and conviction for murder following the reversal on appeal of an earlier manslaughter conviction did not amount to "a case of twice in jeopardy under any view of the Constitution of the United States." *Id.*, at 285.[16] We have since recognized that the "waiver" rationale is a "conceptual abstraction" which obscures rather than illuminates the underlying clash of societal and individual interests. See *United States* v. *Tateo*, 377 U. S. 463, 466 (1964). Accordingly, I do not think that the reasoning in *Trono* or the apparent holding in *Brantley*, insofar as they would require affirmance of petitioner's larceny conviction, can any longer be regarded as good law.

Nor did the State in the present case have the sorts of interests which have been held to justify retrial for the same offense after a conviction has been reversed on appeal by the accused and in the more unusual case when an acquittal has been set aside following an appeal by the State.[17] When the accused has obtained a reversal on appeal, the societal interest in convicting the guilty has been deemed too weighty to permit every such accused to be "granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." *United States* v. *Tateo*, *supra*, at 466. The rationale for allowing the State to appeal an acquittal has been that the State, like the accused, is entitled to assure itself of a

[16] *Trono* was the only federal decision cited by the State of Georgia in its brief in *Brantley*.

[17] For more detailed analyses of these interests, see generally Mayers & Yarbrough, Bis Vexari: New Trials and Successive Prosecutions, 74 Harv. L. Rev. 1 (1960); Van Alstyne, In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant, 74 Yale L. J. 606 (1965); Comment, Twice in Jeopardy, 75 Yale L. J. 262 (1965); Note, Double Jeopardy: The Reprosecution Problem, 77 Harv. L. Rev. 1272 (1964).

trial "free from the corrosion of substantial legal error" which might have produced an adverse verdict. See *Palko* v. *Connecticut, supra,* at 328.[18]

In the present case, the State did not appeal, and the defect in the composition of the grand jury could not have affected petitioner's subsequent acquittal at trial. Society's legitimate interest in punishing wrongdoers could have been fully vindicated by retrying petitioner on the burglary count alone, that being the offense of which he was previously convicted. The State had no more interest in compelling petitioner to stand trial again for larceny, of which he had been acquitted, than in retrying any other person declared innocent after an error-free trial. His retrial on the larceny count therefore, in my opinion, denied due process, and on that ground reversal would be called for under *Palko.*

[18] However, in the federal system it has been held that the Government may not appeal from an acquittal without placing the accused "a second time in jeopardy for the same offense." *Kepner* v. *United States,* 195 U. S. 100, 133 (1904). See also *id.,* at 134–137 (Holmes, J., dissenting).